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NO. 72-97

FILED

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IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

Walter T. Simmons
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

MAX E. WINN,

Plaintiff-Appellant,

v.

STATE OF ILLINOIS CIVIL SERVICE
COMMISSION; DEPARTMENT OF PUBLIC
AID; and WILLIAMSON COUNTY DE-
PARTMENT OF PUBLIC AID,

Defendants-Appellees,

) Appeal from the Circuit Court
) for the First Judicial Circuit,
) Williamson County, Illinois.

) Honorable Stewart Cluster,
) Presiding Judge.

JUSTICE CREBS delivered the opinion of the court:

Respondent, Max E. Winn, was a ~~certified~~ employee holding the position of Public Aid Caseworker II and his primary function as a caseworker was to receive applications and determine the eligibility of recipients for Public Aid funds. He performed his duties as a caseworker at the Williamson County Department of Public Aid, and primarily operated in the small Illinois community known as Creal Springs. In September of 1968, Respondent was suspended for a period of 30 days "pending investigation of performance of duties and conduct", and, on October 21, 1968, the Illinois Department of Public Aid initiated discharge proceedings against Respondent pursuant to and in accordance with the provisions of Sections 8b(16), 9(5), 10(6) and 11 of the Personnel Code Ill. Rev. Stat. 1967, ch. 127, par. 63b108b (16), 63b109 (5) 63b110 (6) and 63b111), implemented by Personnel Rules 2-720, 2-730, 2-740, 2-750, 2-760 and 2-770, on the grounds that he had: 1) improperly authorized public assistance funds, and 2) appropriated such funds for his personal gain.

Having been notified of said charges, the Respondent thereupon requested in writing that the Civil Service Commission grant him a hearing. That hearing was held on May 12, 1969 in Springfield before Simon L. Friedman, a Civil Service Hearing Officer.

At the hearing, counsel for the Petitioner, Department of Public Aid, moved to dismiss certain specifications of the charges contained in a bill of particulars which had been filed earlier by the Department. There being no objection by counsel for the Respondent, Max E. Winn, the Hearings Officer granted the motion and ordered dismissed Specifications 1, 3, 5, 6, and 7. In addition, the Hearings Officer struck Specification 10 on the grounds that it was irrelevant to the subject matter of the case. The remaining Specifications of the charges are as follows:

Specification 2--that in April of 1966, Max E. Winn prepared and submitted a request for an emergency warrant to be issued to a Bobby Jo Bozarth, a recipient of public assistance, in the amount of \$228.00 of which only a small amount was turned over to Bobby Jo Bozarth.

Specification 4--that in March of 1965, Max E. Winn directed Edward Williams, recipient of public assistance, to give \$26.60 to Lynn Wolaver for transportation expense to and from a vocational school even though said Lynn Wolaver did not furnish transportation to Edward Williams.

Specification 8--that Max E. Winn in 1966 caused three emergency warrants to be issued to a child recipient, a recipient of public assistance, during the time said child was attending the Vocational Training Institute at Southern Illinois University.

Specification 9--that Max E. Winn caused at least three emergency warrants to be issued to Virgin Thompson, a recipient of Public assistance, during the time Virgin Thompson was attending the Vocational Training Institute at Southern Illinois University.

Specification 11--that in October of 1966 Max E. Winn prepared and submitted a request for a \$100 emergency warrant to be issued to Johnny J. Ralls, a recipient of Public Assistance, and that such issuance of such emergency warrant was improper.

Specification 12--that on two occasions, January and February in 1967, Max E. Winn prepared and submitted requests for emergency warrants to be issued to Virginia Herring, a recipient of Public Assistance, and that only a portion of said assistance was actually received by Virginia Herring.

On March 3, 1970 the Hearings Officer filed his Findings of Fact and his Recommended Decision. After hearing all the evidence presented by both Petitioner and Respondent, the Hearings Officer concluded the facts of this case reflected a "procedure of payment and disbursement that is not sanctioned in the official bulletins issued by the State."

From all the facts and the evidence the Hearings Officer concluded (a) that Respondent had improperly utilized on various occasions the issuance of public assistance funds and (b) that "there is a fair inference that Respondent applied and proceeds to his personal gain." A recommendation was made to discharge Respondent. The Civil Service Commission entered a finding concurring in the Hearings Officer's findings with the exception that the Hearings Officer inferred that the Respondent appropriated state funds for his personal gain, "since the Commission felt the obverse could as well be inferred from the evidence presented."

The Circuit Court of Williamson County affirmed the findings of the Civil Service Commission and the Respondent appeals the decision of the Trial Court.

Administrative findings of fact are deemed prima facie true and correct, and courts will not review evidence or make independent determinations of fact so long as the findings of the agency are based upon substantial evidence. (Episcopo v. Dept. of Registration, 5 Ill.App.3d 1077, 284 N.E.2d 240.) In this case the Trial Court upheld the determination of the Civil Service Commission.



For the purposes of this opinion we shall consider only the charges in Specifications 2, 4, 11, and 12. The following is a summarization of the Hearings Officer's findings pertaining to Specifications 2, 4, 11, and 12.

With respect to the allegations contained in Specification Two of the charges, Bobby Bozarth testified that he is a resident of Creal Springs, Williamson County. In April of 1966, Bozarth, a public aid recipient, requested from Respondent emergency funds to travel to northern Illinois where his brother-in-law would secure employment for him. Approximately May 3, 1966 Bozarth received by mail a check dated May 2, 1966 from the Department of Public Aid in the amount of \$228.00, which he endorsed and gave to respondent. Bozarth testified that later he met Winn on the street and Winn told him the amount was excessive and some of it would have to be returned. After the check was cashed Bozarth received some of the money. Bozarth said he received only \$43 and Winn said Bozarth received \$80 at that time and later received \$148. Bozarth testified that about a month later he and Winn went for a ride in the country and that he signed a receipt for \$143 but received only five dollars. According to Winn he gave Bozarth \$148 at this time but received a receipt for only \$143. Winn stated that his immediate supervisor, Mrs. Ebersohl, calculated the amount that was to be sent to Bozarth, and that the latter told Winn that he wanted to take his family north with him. Bozarth said that he never planned to take his family with him, but that he did go to Maywood, Illinois but was unable to secure employment. Bozarth said that \$40.00 would be sufficient to cover the cost of his trip. Mr. Lowell Ledford, Superintendent of the Williamson County Department of Public Aid for the last ten years, testified that a search of his records failed to disclose that any proceeds of a warrant payable to Bobby Joe Bozarth were ever returned to the State of Illinois.



With respect to the allegations contained in Specification Four of the charges, the Williamson County Department of Public Aid had instituted a program to screen public aid recipients for attendance at the Vocational Training Institute of Southern Illinois University, located about eight miles west of Marion, Illinois. The Institute trains persons of limited ability or education. Mr. Ledford asked Winn to arrange means of transporting recipients to and from the institute. Winn asked an acquaintance, Lynn Wolaver, to provide transportation for compensation at the rate of six cents per mile per person. The monthly welfare check received by the recipients included the cost for transportation which was then paid to Wolaver by the recipient, Edward Williams, who attended the Institute. Williams testified that Winn was his caseworker and that Winn told Williams that he would have to pay for his transportation. Williams said he would provide his own transportation, but Winn told Williams that he would have to pay anyway. Although Williams provided his own transportation, he was required to give a money order in the sum of \$26.60 to the Respondent payable to Lynn Wolaver. Winn admitted that Williams provided his own transportation, but said that the \$26.60 received from Williams was used to pay Wolaver for the transportation he provided for the other recipients who were attending the Institute. Originally Wolaver was paid by the County Department of Public Aid, but subsequently received checks for transportation costs directly from the recipients. Ledford testified that he was aware of the method used to pay Wolaver for the transportation. He stated "It was the only method we had left from the--from Springfield directly to the recipient, the check." He also stated that he did not know the checks were endorsed by the recipients and given to the Respondent and said that such procedure was unusual. He said that the usual practice was to have the transportation expense included in the monthly welfare check and for the recipient to pay for the trans-

portation himself. Lodford said he never sanctioned the practice of having the recipient endorse the check and then handing it over to Winn.

With respect to the allegations in Specification Eleven of the charges, Mrs. Johnny J. Ralls, a welfare recipient, testified that she had remarried after a divorce and that she had two minor children by her former husband. In 1966, her second husband died, and because her former husband was on strike against his employer, Mrs. Ralls requested that her caseworker, the Respondent, obtain extra assistance in the sum of \$1.00 to pay for food for her children. She received a check for \$1.00 dated October 21, 1966. The check bears the endorsements of Mrs. Ralls and Mr. W. D. Holmes. Shortly after she received the check the Respondent came to Mrs. Ralls home and told her to endorse the check and to give it to him because it had to be returned to the Department of Public Aid. She did as he directed. Mrs. Ralls identified Holmes as the grocer from whom she bought her food supplies. She said that she bought on credit from Mr. Holmes "just once in awhile." The Respondent testified that he arranged with Mr. Holmes, the grocer, to extend credit to the Ralls family. When the check was received by Mrs. Ralls, Respondent had her endorse it and he turned it over to Mr. Holmes to pay for the food bills.

With respect to the allegations contained in Specification Twelve of the charges, Mrs. Virginia Herring, a welfare recipient, testified that in 1966 the Respondent asked her to provide a temporary home for about five abandoned children. During December of 1966 and January of 1967, Mrs. Herring took care of the children. For such services, Respondent requested that Mrs. Herring be compensated. She received by mail a check dated January 26, 1967 for \$250.56 and a check dated March 3, 1967 for \$292.89. She endorsed both checks and turned them over to Winn at his direction.

Respondent paid her \$140.00 from the proceeds of the first check and \$55.00 from the proceeds of the second check telling her it was compensation for the child care services. She received no other sums of money. However, she was granted credit privileges at the grocery operated by Mr. Holmes. Altogether, she received gratis \$68.00 worth of groceries. When asked if she was expected to feed five children for seven weeks on \$68.00, she said: "I used my budget, we made do." The checks bear the endorsements of Mrs. Herring and Mr. Holmes. Mrs. Herring testified that Respondent told her he would pay the rent, grocery bill, gas and electricity bills with the balance of the proceeds. She also believed that she signed receipts for the money given her by Respondent. According to the Respondent the amount of each check was based upon costs for food, personal expenses, gas, clothing, rent, electricity, household expenses and foster services. Respondent admitted that he secured Mrs. Herring's signature on the warrants. He then gave the checks to Mr. Holmes to pay for Mrs. Herring's grocery bills. The balance was used to pay other bills of Mrs. Herring and payments of \$55.00 and \$140.00 were made to Mrs. Herring for rendering the foster services.

The Hearings Officer concluded that the transactions concerning Edward Williams were confusing. Williams was required to give over the amount of \$26.60 for transportation expense even though he did not ride to school in the car owned by Lynn Wolaver. We must agree that the transaction is confusing as well as improper.

As regards the transactions with Mr. Bozarth, Mrs. Herring and Mrs. Ralls, there are direct conflicts in the testimony. Mr. Bozarth testified to receiving a check for \$228, endorsing the same to the Respondent and receiving only \$43.00. Several weeks later, he received an additional five dollars. Mr. Williams claimed that he gave Bozarth \$80 the first time and the balance several weeks later. The circumstances surrounding the transaction, i.e.,

the ride to the countryside, the type of receipts made, and the want of interest in the outcome of this hearing on the part of Mr. Bozarth, leads to the conclusion that the Petitioner has sustained the burden of proof necessary. The testimony of Virginia Herring and Johnny J. Ralls clearly shows that these two people received warrants from the State of Illinois and subsequently endorsed them and gave them to the Respondent. Mrs. Herring received a part of the proceeds but Mrs. Ralls received none of the proceeds. These checks also show the endorsement of "W. H. Holmes" who operates a grocery store in the community. Mr. Holmes was not a witness in this case. There is no acceptable accounting for the disbursement of the balance of the proceeds of the checks obtained from these two recipients by the Respondent. Nor is there any evidence that the Department of Public Aid received a refund or official receipt therefor. Further, official procedures require that expenditure of excess assistance funds be approved by the Department and the record shows there has been no approval therefor.

The Hearings Officer, the Civil Service Commission, and the Trial Court all found that the Respondent was guilty of improper authorization of Public Assistance Funds.

The procedure utilized by the Respondent in securing checks made out to the recipients was not the prescribed procedure. The course of action undertaken by the Respondent after Bozarth, Williams, Ralls, and Herring received checks in the mail may lead to other problems. By having these recipients endorse the checks and then turning them over to the caseworker, the recipients must invariably tend to question the integrity of the caseworker and the system which sends them money through the mail only to have the caseworker take it away. The caseworker is the recipient's link with the Department of Public Aid. The confidence the recipient has in the Department and its programs depends upon his confidence in his caseworker. The recipient, many of whom are unskilled and of limited

education, cannot be expected to have faith in a caseworker's recommendation that the recipient enroll in a training program when that caseworker has taken public assistance funds away that the state had sent directly to the recipient. Under such a procedure the opportunity for misappropriation of funds is great, it does not enhance the faith the individual recipient has in the Department, and it would be improper for us to condone it.

Since the findings will not be overturned if there is sufficient competent evidence in the record to sustain such findings, (Arakie v. Hatoff, 5 Ill.App.3d 1073, 124 N.E.2d 703), it became necessary for the Respondent to show a lack of competent evidence. This he has not done. The fact that a different result might have been reached is not sufficient to justify a reversal. We believe that there clearly is sufficient evidence to uphold the decision.

Finding no reversible error, we affirm.

Publish Abstract Only.

EBERSPACHER, P.J. and MORAN, J.J., Concur

No. 73-143

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

DEC 14 1973

Walter J. Simpson
FIFTH DISTRICT
CLERK OF APPELLATE COURT

DARRELL RAYMER AND ROBERT HAYDEN,	:	
	:	Appeal from the Circuit Court of the
Plaintiffs-Appellees,	:	Twentieth Judicial Circuit, St.
	:	Clair County, Illinois.
	:	
v.	:	
	:	
STERLING MAYFIELD, et al.,	:	Honorable Robert L. Gagen,
	:	Trial Judge.
	:	
Defendants-Appellants.	:	

PRESIDING JUSTICE EBERSPACHER delivered the opinion of the court:

Darrell Raymer and Robert Hayden, hereinafter referred to as the plaintiffs, brought this action on April 11, 1973, by filing a complaint for injunction in the Circuit Court of St. Clair County seeking relief in the form of a restraining order enjoining the defendants from publishing and distributing a certain newspaper.

The St. Clair County Circuit Court granted the injunction without notice and without bond. On April 13, 1973, the defendants filed an answer and a motion to vacate and dissolve the injunction because of alleged insufficiencies in the plaintiffs' pleadings. The court, on April 17, 1973, refused to grant the defendants' motion to vacate and dissolve and from the order denying the motion, this appeal is taken by notice of interlocutory appeal filed May 14, 1973.

The defendants assert that the court below erred in not granting their motion to vacate and dissolve the preliminary injunction.

The gravamen of the dispute between the parties hereto was the publishing of a publication that purported to be a newspaper which was published as a part of a political campaign in which the plaintiff, Robert Hayden, was seeking office in opposition to the defendants Anderson, Sanfleben and Koonce. The defendant, Mayfield, was also running for office. The election was concerned with the Village of

Caseyville's offices of President of the Board of Trustees and Trustees. The plaintiff, Darrell Raymer, was not seeking office, but was a member of the police force of the Village of Caseyville. The election was to occur on April 17, 1973.

The "newspaper" sought to be enjoined accused the plaintiffs of "wire tapping" and of desiring to fingerprint all of the minors of the Village of Caseyville. The plaintiffs' complaint alleged that the defendants published the document on April 10, 1973, one week before the election to be held on April 17, 1973, and that the defendants falsely and maliciously accused the plaintiffs of wire tapping and of desiring to fingerprint the minor residents of Caseyville with the knowledge of the falsity of the accusations.

The record does not indicate whether or not, in fact, the election occurred. Statements in the parties' briefs indicate that the election did take place on April 17, 1973. An examination, however, of the publication indicates quite clearly that the contents of the publication were designed to influence the outcome of the election to be held on April 17, 1973. The newspaper contained a sample ballot, requests for votes, and numerous articles that related to the election, none of which related to local, state or national general news.

The appellants contend that the court below erred in refusing to grant their motion to vacate and by not dissolving the preliminary injunction.

The appellees assert that not only did the court act correctly but also that the issue is now moot because the events mentioned in the complaint have already occurred.

The plaintiffs go further and state that if the defendants at this time were to file a motion to dissolve the injunction that the motion would not be resisted.

The case of Chicago Bears Football Club v. City of Evanston, 131 Ill.App.2d 600, 266 N.E.2d 523, is determinative of the present case. The Court in the Chicago Bears case at page 602, stated:

"The order granting the temporary injunction was entered for the purpose of allowing the scheduled Bears' game to be played at Dyche Stadium on September 27, 1970. We agree with the position of the appellants that the appeal is now moot."

The facts of the present case although involving an election and not a foot-ball game, appear to this Court to be moot. The election has occurred and the issue has been decided.

Because the issues before this Court are moot, we shall not consider the allegations of the appellants concerning the sufficiency of the injunction.

As the appeal is now moot, the appeal is dismissed.

G. MORAN and CREBS, J.J., CONCUR

PUBLISH ABSTRACT ONLY

58956



16 I.A. 31 61

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
LARRY LAWSON,	)	LOUIS B. GARIPPO,
Defendant-Appellant.	)	JUDGE PRESIDING.

PER CURIAM:

Larry Lawson, defendant, was charged by indictment with violation of bail bond (commonly known as bail jumping) in violation of section 32-10 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 32-10). After a bench trial, defendant was found guilty and sentenced to a term of one to two years, the sentence to run consecutively with his previously imposed Federal sentence. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt and that the cause should be remanded for resentencing under the Unified Code of Corrections.

At trial, the following evidence was adduced: William Callaghan, a Chicago police officer, testified that on September 3, 1970, he arrested the defendant, Larry Lawson, on the charge of possession of heroin. Subsequently, he appeared before the Cook County Grand Jury and an indictment was returned against defendant charging possession of heroin.

Daniel Rosen, the chief clerk of the circuit court of Cook County, criminal division, testified that defendant was charged by indictment no. 70-3196 with possession of narcotics. Defendant was free on bond. Mr. Rosen testified that during the course of the clerk duties, a journal is maintained which includes entries of what occurred in the courtroom. The journal showed that on June 23, 1971, defendant failed to

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appear and a warrant was issued for his arrest. Defendant did not appear for over thirty days thereafter. Defendant was sent a notice of the bond forfeiture warrant on December 8, 1971.

Defendant testified that he was arrested and subsequently indicted for possession of narcotics in indictment no. 70-3196. He was freed on bond. He appeared in court on June 22, 1971 and the case was continued until June 23, 1971. He stated that due to a motorcycle accident which caused a laceration of his right leg, he did not appear in court. He testified that he called the criminal court building and notified the clerk's office that he would not be able to appear due to his accident. He said that the clerk informed him that if he was unable to appear, he should get a doctor's statement and would be notified of the next court date. Defendant stated that he had gotten a doctor's certificate which he had subsequently lost. Defendant stated that on June 23, 1971, he was not hospitalized and was able to get around a little bit with the use of a crutch. Defendant also related that his attorney advised him that because of the injury it would not be "totally necessary" for defendant to appear in court. Defendant, however, did not call his attorney as a witness.

Defendant's first argument on appeal is that the State failed to prove him guilty beyond a reasonable doubt because the State did not establish that his conduct was willful. Defendant was charged with violation of bail bond (bail jumping) in violation of section 32-10 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 32-10). That section reads:

"Whoever, having been admitted to bail for appearance before any court of record of this State, incurs a forfeiture of the bail and willfully fails to surrender himself within 30 days following the date of such forfeiture, shall * * *."

Defendant argues that there is no evidence that he knew that he must surrender himself within 30 days and there is no evidence that he was physically capable of surrendering himself and, therefore, the element of willfulness was not established.

To sustain a conviction under this statute, it is not necessary that the State establish that the defendant knew he must surrender himself within 30 days. It is only necessary for the State to prove that the defendant incurred a forfeiture of his bail, that the defendant failed to surrender himself within 30 days following the date of such forfeiture and that defendant's failure to surrender was willful.

Conduct is performed willfully if it is performed knowingly (Ill. Rev. Stat. 1969, ch. 38, par. 4-5). It is well established that knowledge may be proven by circumstantial evidence (People v. Zazzetti, 6 Ill. App. 3d 858, 286 N.E.2d 745). In the case at bar, the testimony of Officer Callaghan and Daniel Rosen established that defendant was arrested for possession of narcotics and indicted under indictment no. 70-3196. Defendant appeared in court on June 22, 1971 and his case was continued until June 23, 1971. Defendant was to appear in court on June 23, 1971. Defendant failed to appear on that date and for a period of over 30 days thereafter. Defendant's own testimony established that he realized that as a condition of being placed on bail, he was to appear in court and that if he failed to appear, a warrant would be issued for his arrest. Defendant had been previously placed on bail and was, therefore, no stranger to bail bond procedures. The evidence was sufficient to constitute a basis upon which to infer that defendant's acts were committed willfully.

Defendant argues that his testimony was uncontradicted and established that he was notified by the clerk that he would be told of the subsequent court date and that he was physically incapable of going to court to surrender himself within the 30 day period. It is the function of the trier of fact to weigh testimony, judge the credibility of witnesses and determine factual matters. The court of review will not substitute its judgment for that of the trial court unless the evidence is so unsatisfactory as to leave a reasonable doubt of defendant's guilt (People v. Hampton, 44 Ill. 2d 41, 253 N.E.2d 385; People v. Holmes, 6 Ill. App. 3d 254, 285 N.E.2d 561). A trial judge is not obliged to believe a defendant's testimony (People v. Jones, 11 Ill. App. 3d 450, 297 N.E.2d 178). In the case at bar the evidence is sufficient to establish defendant's guilt beyond a reasonable doubt.

Defendant's second argument is that his case should be remanded for resentencing in light of the Unified Code of Corrections. Defendant was convicted of violation of bail bond which under the Unified Code of Corrections is a Class 4 felony (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 32-10). The Code provides that the minimum sentence for a Class 4 felony is one year in all cases (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1(a)(5)) and that the maximum term shall be any term in excess of one year and not exceeding three years (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1(b)(5)). The Code also provides that consecutive sentences may be imposed (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-4). In the case at bar, defendant's sentence of one to two years is proper under the Unified Code of Corrections and we find no reason to remand for resentencing.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

SECOND DIVISION

HAYES, J., did not participate.

(Abstract only.)



277-27

59007

16 I.A. 3162

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
MAURICE GARDNER,	)	HONORABLE ARTHUR V. ZELEZINSKI,
	)	Presiding.
Defendant-Appellant.)	

PER CURIAM:*

Maurice Gardner (defendant) was found guilty after a bench trial of the offense of theft and was sentenced to a term of six months in the House of Correction. Ill.Rev.Stat. 1971, ch. 38, par. 16-1. He appealed.

The public defender of Cook County was appointed as counsel for defendant on appeal and has filed in this court a motion for leave to withdraw as appellate counsel on the ground that the appeal is frivolous and without merit; the motion is supported by a brief pursuant to Anders v. California, 386 U.S. 738. Defendant was forwarded copies of the motion and supporting brief and was allowed additional time within which to file any points he desired to support the appeal; he has not responded.

Appellate counsel advances as the sole issue which could be raised on this appeal and which, in final analysis, is without merit, the question of whether the State proved defendant guilty of the offense of theft beyond a reasonable doubt.

Mrs. Rose Sims testified that she was walking near 67th Street and Ellis Avenue in Chicago at about 11:00 A.M. on September 12, 1972, when a man whom she identified as the defendant ran up to her and, after a brief struggle, ran off with her purse containing a peculiarly folded ten-dollar bill and some loose change. Mrs. Sims called for help, the defendant was pursued by several persons, and the defendant was returned to her presence a short time later in the company of the

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police. A bystander testified that after he gave the defendant a match which the latter had requested, he observed the defendant take Mrs. Sims' purse; he pursued the defendant and helped apprehend him a short while later. A police officer summoned to the scene testified that a search of the defendant revealed a peculiarly folded ten-dollar bill and some loose change.

The defendant admitted to having been at the scene of the theft, but testified that the offense was committed by an acquaintance whom he met on the street immediately prior thereto; he testified that after the acquaintance, whose last name and whose address the defendant did not know, took the purse, he (defendant) also ran from the scene because he felt that he too was "involved" since he was with the offender and since the latter's act had "reflected" on him. Defendant denied taking the complaining witness' purse or money.

In light of the foregoing summary of the evidence, we are in accord with appellate counsel's conclusion that the question of whether the State proved defendant guilty of theft beyond a reasonable doubt cannot support an appeal in this case. The resolution of any conflicts in the evidence, and the weight to be accorded the testimony of the witnesses, were for the trier of fact; under the circumstances of this case, this court will not substitute its judgment for that of the trier of fact. People v. Graham, 127 Ill.App.2d 272, 262 N.E.2d 243.

This court has also independently reviewed the instant record, in conformance with the dictates of the Anders case, and has found no additional grounds upon which an appeal in this case may be based. The appeal is frivolous and without merit.

The motion of the public defender of Cook County for leave to withdraw as appellate counsel is accordingly allowed and the judgment of the Circuit Court of Cook County is affirmed.

MOTION ALLOWED;
JUDGMENT AFFIRMED.

FIRST DISTRICT - SECOND DIVISION
*LEIGHTON, J., did not participate.

PUBLISH ABSTRACT ONLY.



16 I.A. 31 20

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
v.)	
)	
JOHNNIE HALL,	)	HONORABLE
	)	JAMES M. BAILEY,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM (FIRST DISTRICT, FIFTH DIVISION*):

A delinquency petition was originally filed against defendant, age 16, before the juvenile division of the circuit court. On November 19, 1971, a hearing was held on the State's motion to transfer the case to the criminal division. The judge in the juvenile division made no objection to the removal of the case and the State's motion was granted. Defendant was subsequently indicted for murder and attempt (armed robbery). On May 31, 1972, there was a negotiated plea of guilty which was accepted by the court and defendant was sentenced to the minimum statutory term of 14 years to 14 years and one day.

On appeal, defendant contends (1) that he was deprived of his constitutional safeguards when his case was transferred from the juvenile division to the criminal division of the circuit court, and (2) that his minimum sentence of 14 years violates article I, section 11 of the Illinois Constitution.

Defendant's first point complains of the allowance of the state's attorney's motion to transfer the case from the juvenile to the criminal division of the court pursuant to section 2-7(3) of the Illinois Juvenile Court Act (Ill.Rev. Stat. 1971, ch. 37, par. 702-7(3)) without objection to the removal by the juvenile court judge. Defendant does not argue that the statute was not complied with, but does argue that the

* SULLIVAN, J., did not participate.

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section concerned is unconstitutional in that it deprived him of due process of law and violated the separation of powers provision of the Illinois Constitution. Section 2-7(3) of the Act provides:

(3) If a petition alleges commission by a minor 13 years of age or over of an act which constitutes a crime under the laws of this State, the State's Attorney shall determine the court in which that minor is to be prosecuted; however, if the Juvenile Court Judge objects to the removal of a case from the jurisdiction of the Juvenile Court, the matter shall be referred to the chief judge of the circuit for decision and disposition. If criminal proceedings are instituted, the petition shall be dismissed insofar as the act or acts involved in the criminal proceedings are concerned. Taking of evidence in an adjudicatory hearing in any such case is a bar to criminal proceedings based upon the conduct alleged in the petition.

Defendant's claim is without merit. The Illinois Supreme Court has recently held repeatedly that the section of the statute in question is constitutional and does not violate due process or equal protection requirements. People v. Reese, 54 Ill.2d 51, 294 N.E.2d 288; People v. Hawkins, 53 Ill.2d 181, 290 N.E.2d 231; People v. Bombacino, 51 Ill.2d 17, 280 N.E.2d 697, cert. denied 93 S. Ct. 230; People v. Handley, 51 Ill.2d 229, 282 N.E.2d 131. Defendant also contends that section 2-7(3) of the Act violates the constitutional separation of powers, arguing that the authority given to the state's attorney amounts to a delegation of judicial power. In People v. Handley, 51 Ill.2d 229, 282 N.E.2d 131, however, the Supreme Court specifically held that the delegation of

* On February 20, 1972, the U.S. District Court for the Northern District of Illinois granted a petition for writ of habeas corpus. People ex rel. Bombacino v. Bensinger. The State appealed and briefs have now been filed in the 7th Circuit Court of Appeals. (In Cox v. United States, 473 F.2d 334, the Court of Appeals for the District of Columbia held proper a Washington, D.C. enactment similar to the Illinois statute.) We have also noted that the Illinois Supreme Court decisions in Hawkins and Reese were filed after the District Court decision in Bombacino.

authority in question was proper. The court said at page 233:

We do not find it constitutionally objectionable that the legislature has seen fit to grant discretion to the State's Attorney in removal matters under the Juvenile Court Act, ***.

Defendant's other point raised on this appeal is that his minimum sentence of 14 years as prescribed by statute (Ill. Rev.Stat. 1971, ch. 38, par. 9-1) is unconstitutional in that it violates article I, section 11 of the Illinois Constitution. That section of the constitution provides:

All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.

Defendant's brief seeks to make much of the recommendation contained in the American Bar Association's Standards Relating to Sentencing, which strongly advised against a legislative specification of a mandatory sentence, particularly with regard to a minimum term. Were we to agree with this proposition, it would avail defendant nothing, as the Bar Association standards were no more than advice to the legislatures throughout the country, and their recommendation must be viewed by us as having been considered and rejected by the Illinois General Assembly when it subsequently enacted the Unified Code of Corrections, including a minimum term of 14 years for murder. Ill.Rev.Stat. 1972 Supp., ch. 38, par. 1005-8-1(c).

Further, in People v. Cantrell, _____ Ill.App.3d _____, (No. 57768, First Dist., filed October 16, 1973), this court rejected the identical contention made here by defendant, holding, " *** that the statutory minimum sentence for murder of 14 years is constitutionally permissible" and does not violate article I, section 11 of the Illinois Constitution.

The judgment of the circuit court is affirmed.

A F F I R M E D.

five minutes. The victims then started down the alley toward home and, after stopping for a drink of the vodka, they went inside and called the police, who arrived about five minutes later. When the police arrived, the victims rode around in the squad car for about seven or ten minutes until they observed the defendant come out of the Norman Berg Liquor Store and pointed him out to the police, who arrested him. The defendant was wearing a brown cashmere coat, brown bell bottom pants and a two-tone gray shirt at the time of the robbery and at the time of the arrest.

Julius Thomas, the other victim, told essentially the same story and identified the defendant in court as one of the robbers. He testified that the defendant was wearing a brown cashmere coat, a gray and white shirt with a long collar and light brown pants.

Chicago police officer Arthur Simpson testified that he responded to the robbery call and placed the defendant under arrest when Mr. Thomas and Mr. Harris pointed him out. The defendant denied knowing anything about the incident and the search of his person resulted in \$15 and some change, but no weapon. The arrest report stated the defendant was wearing "brown coat, green shirt and black and red pants" but the color of the shirt should have been "gray."

Charles Dansler testified that he was with the defendant when he was arrested and for about 15 minutes before that; he did not see the defendant with a knife or with any sums of money over \$1. When Officer Simpson arrested the defendant and said it was for robbery, Dansler said, "No good Charlie. That man been with me."

Raymond Edwards testified that on March 6, 1972, he and Mr. Dansler were with the defendant for about a half hour before the defendant's arrest and were in the Cut-Rate Liquor Store. Defendant and the other man, Dansler, however, were gone for about five minutes. Defendant had on checkered pants, beige looking semi-maxi coat, a green shirt and brown shoes. He did not see either Mr. Harris or Mr. Thomas in the liquor store.

Gene Drungole, the defendant, testified he was wearing a brown semi-maxi coat, a green brown collared shirt, red and black plaid pants and brown shoes, and had been in the company of Mr. Dansler and Mr. Edwards for a half hour or 45 minutes prior to his arrest. He had sixteen cents on his person when arrested.

In rebuttal, Willie Harris testified that the name of the store where he bought the liquor at 47th and Langley is Berg's Liquor Store, Cut-Rate Liquor Store.

Defendant first argues that he was not proven guilty beyond a reasonable doubt because the identification contained several serious weaknesses. First, he says, neither Harris nor Thomas ever described to the police the facial characteristics of the man who robbed them. However, this is not surprising since the defendant was apprehended within ten minutes of the appearance of the police on the scene. Defendant also emphasizes the conflicts in the testimony of the witnesses concerning the physical appearance of the defendant: for example, that while Thomas and Harris agreed in their testimony, the defense witnesses and Officer Simpson said the defendant had on red and black plaid pants rather than brown pants. However, given that both victims were being held at knife-point in an alley and that the defendant had on a three-quarter length maxi-coat, a discrepancy as to the color of the pants that the defendant was wearing is inconsequential. The defendant's alibi testimony is not convincing and at most presented a question of credibility for the trier of fact to determine. Edwards testified that the defendant and Dansler left for about five minutes, which was ample time for defendant to have gone around the corner and committed the robbery, dispose of the proceeds, including the weapon, and return to the Cut-Rate Liquor Store. Defendant also fails to explain why neither he nor his witnesses saw the victims when they purchased their liquor at the Cut-Rate Liquor Store. The testimony of both eyewitnesses was essentially unimpeached except for the minor detail about the

color of the defendant's pants, each had adequate opportunity to view the accused and the identification was made within a few minutes after the offense was committed. A reviewing court will not upset a verdict provided the witnesses are credible and view the accused under such circumstances as would permit a positive identification to be made. Such was the case here and the evidence was adequate to prove the defendant guilty beyond a reasonable doubt. People v. Stringer, 52 Ill.2d 564, 568-569, 289 N.E.2d 631.

Defendant next argues that the minimum term of his sentence should be reduced from five years to four years in accordance with the provisions of the Unified Code of Corrections, which became effective January 1, 1973. Ill.Rev.Stat. 1971, ch. 38, par. 18-2 (b), as amended effective August 24, 1971, under which the defendant was sentenced, provided a five year minimum for armed robbery, but Ill.Rev.Stat. 1972 Supp., ch. 38, par. 18-2(b), makes armed robbery a Class 1 felony. Ill.Rev.Stat. 1972 Supp., ch. 38, par. 1005-8-1(c)(2) provides that the minimum term for a Class 1 felony shall be four years unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term. Ill.Rev.Stat. 1972 Supp., ch. 38, par. 1008-2-4 provides that "sentences under this act apply if they are less than under the prior law upon which the prosecution was commenced."

Accordingly, the judgment of conviction of the circuit court of Cook County is affirmed and the cause is remanded to the circuit court of Cook County with directions to impose a new minimum term of four years unless the court finds that the nature and circumstances of the offense and the history and character of the defendant warrant the higher minimum term of five years originally imposed.

JUDGMENT AFFIRMED;
CAUSE REMANDED.

IN THE

16 I.A. 170

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the 16th
	)	Judicial Circuit, Kane County.
v.)	
	)	Hon. John S. Petersen
ROBERT A. SOULE,	)	Judge presiding
)	
Defendant-Appellant.)	

MR. JUSTICE WILLIAM L. GUILD delivered the opinion of the court:

This is the fourth of three appeals involving four defendants arising out of armed robbery committed in the residence of Mrs. La Verne Garcia in Elgin, Illinois on January 9, 1971.

A number of issues were raised in the other three appeals and in each case the convictions were affirmed. (See People v. Iverson (1973), 9 Ill. App. 3d 706; People v. Stephens (1973), 12 Ill. App. 3d 215; People v. Friday (1973), 11 Ill. App. 3d 1071.) Defendant Iverson was sentenced 5-10 years and defendant Stephens 8-12 years. In the case of Friday the trial court sentenced him to 15-35 years to be served consecutively to a prior sentence of 18 months to 7 years. The consecutive sentence of 15-35 years was reduced by this court to a sentence of 5-12 years to be served consecutively to the prior sentence.

Reference is made to the above three cases with relation to the facts concerning the instant offense. Sufficeth to say, Soule was a party to an armed robbery in a residence where the telephone wires were cut and the victims bound and gagged and property valued up to \$20,000 was taken.

Upon a plea of guilty, defendant Soule who had been the State's witness involving the other defendants was reluctantly granted probation for a period of 5 years by the trial court on November 11, 1971. Approximately two and one-half months later on January 27, 1972, the defendant was apprehended in the act of burglarizing a residence in Woodford County, Illinois. He apparently was armed and exchanged gun shots with the police prior to his apprehension. On April 4, 1972 he plead guilty to that offense of burglary and was sentenced 2-10 years in the State penitentiary. On April 26, 1972 a petition to revoke probation was filed because of the commission of the subsequent felony. On May 19, 1972 the defendant's probation was revoked and he was sentenced to the State penitentiary for a concurrent sentence of 5-12 years to be served with the sentence imposed for the burglary in Woodford County.

The sole issue raised in the instant appeal is that both the minimum and maximum sentences imposed were excessive.

At the outset, it is to be observed that armed robbery under the Unified Code of Corrections, (Ill. Rev. Stat. 1972 Supp., Ch. 38, Sec. 1005-6-4 (h)) is a Class I offense to which the 1-3 ratio is not applicable. We do not agree that the sentence imposed is excessive. Defendant Soule's co-defendants each received a sentence commensurate with the sentence imposed upon him. Unlike the other three defendants, Soule was granted probation and shortly thereafter committed another felony. It is difficult to see how the sentence of 5-12 years imposed upon the revocation of his probation is excessive in the light of the sentences imposed upon the co-defendants where no

'probation was granted. It is also to be noted that the sentence imposed upon defendant Friday is exactly the same as that imposed upon Soule; except that Soule's sentence was to be served concurrently with the 2-10 year sentence for the burglary committed while on probation, while Friday's sentence was to be served consecutively.

The judgment of the trial court is therefore affirmed.
JUDGMENT AFFIRMED.

THOMAS J. MORAN, P.J., and SEIDENFELD, J., concur.



57423)
58359) Consolidated

16 I.A. 31 177

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Respondent-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
	)	OF COOK COUNTY.
v.)	
	)	HONORABLE
EDDIE CHAMBERS,	)	HERBERT R. FRIEDLUND
	)	& REGINALD J. HOLZER,
Petitioner-Appellant.	)	Judges Presiding.

PER CURIAM * (First Division, First District):

Eddie Chambers (petitioner) was found guilty at separate bench trials of the offense of rape and the offenses of murder and robbery, and was sentenced to terms of years in the penitentiary. The rape conviction was affirmed by this court in People v. Chambers, 127 Ill.App.2d 215, 262 N.E.2d 170, and the murder and robbery convictions were affirmed by this court in People v. Chambers, 112 Ill.App.2d 347, 251 N.E.2d 362.

Petitioner subsequently filed separate pro se petitions pursuant to the Illinois Post-Conviction Hearing Act as to the rape conviction (P.C. 2228) and as to the murder and robbery convictions (P.C. 2201). (Ill.Rev.Stat. 1971, ch. 38, par. 122-1 et seq.) Each of the pro se petitions alleged factual matters which either were or could have been raised on the direct appeals as grounds for relief under the Post-Conviction Hearing Act. The same counsel was appointed to represent petitioner in both post-conviction proceedings and he filed amended post-conviction petitions in which he abandoned the grounds alleged in the two pro se petitions. The amended petitions advanced the allegation that petitioner's constitutional rights were violated in that matters were brought out at the hearings in aggravation and mitigation in each of the trials which raised a bona fide doubt as to his competency to stand trial and which should have prompted the respective trial courts to grant, sua sponte, a hearing as to the question

* Mr. Justice Hallett did not participate.

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of competency. Attached to the amended post-conviction petitions were copies of the respective hearings in aggravation and mitigation and the affidavits of a doctor who conducted a psychiatric examination of the petitioner shortly prior thereto.

After brief hearings were held on the State's motions to dismiss before the same judges who presided over the respective trials, the amended petitions were dismissed without evidentiary hearings. The separate appeals filed from each dismissal, General Number 57423 from the dismissal of P.C. 2228 in the rape case, and General Number 58359 from the dismissal of P.C. 2201 in the murder and robbery case, have been consolidated here inasmuch as they both involve the same question: whether petitioner's psychiatric and psychological background, as related to the respective trial courts at the hearings in aggravation and mitigation held in both cases, raised a bona fide doubt as to petitioner's competency to stand trial in each instance, thereby requiring the respective trial courts to hold hearings in that regard on the courts' own motions.

Petitioner was represented by the same counsel at both trials and essentially the same information was related by his counsel during the hearings in aggravation and mitigation at the trial of both cases: counsel had engaged in an extensive investigation of petitioner's mental history and had determined, with the aid and efforts of three psychiatrists and one psychologist, that petitioner's parents were cousins, that members of his family had been in mental institutions, that he was "mentally retarded," that he had been struck in the head as a youth with a baseball bat and had suffered periods of lapse of consciousness, and that he "possibly" had organic brain damage. Some of the psychiatric reports, including the behavior clinic report, determined that petitioner understood the nature of the

charges against him and that he was able to cooperate with counsel, and other than those findings, none of the reports appears to have shown that petitioner was not competent to stand trial.

At the hearing on the State's motion to dismiss amended petition #2201, the court commented that the matters contained in the petition were brought out at the hearing in aggravation and mitigation, that the court at that time "must have" read those matters and "probably" gave them the credence they deserved, and that if they had raised a doubt in the judge's mind at that earlier time, he would have given petitioner the benefit of that doubt. At the hearing on the State's motion to dismiss the amended petition #2228, the court commented that he had read the material presented, and that he was familiar with the court's disposition of the identical issue raised in petition #2201.

The records in the instant appeals disclose that the issue of the petitioner's competency to stand trial was not raised at either of the respective trials, nor at the hearings in aggravation and mitigation when the circumstances of his mental history were presented to the courts and thereby spread of record in those cases, nor on the direct appeals from the respective convictions; the medical history was introduced at that time solely to affect the sentences to be imposed in the two cases. Petitioner's counsel at the trial of the cases had ordered the four mental examinations and, after consultations with those doctors, he determined only that the information received relative to petitioner's mental history would not make available the defense of insanity in either of the cases. No intimation exists of record that counsel, the courts or the doctors considered petitioner incompetent to stand trial

based upon the medical findings, and nothing appears of record apart from those findings otherwise bearing on petitioner's competency to stand trial.

Determination of the question of whether the circumstances of petitioner's mental history and the other facts in the respective cases raised a bona fide doubt as to petitioner's competency to stand trial was within the discretion of the respective trial courts. (People v. Bortnyak, 39 Ill.2d 545, 548, 237 N.E.2d 451.) The trial courts were fully advised as to petitioner's psychiatric and psychological background, the records thereof were before this court on the respective appeals, and neither trial counsel, appellate counsel nor this court, seriously questioned petitioner's competency to stand trial. The mere fact petitioner had a history of a mental disorder does not, ipso facto, mean that he lacked the mental capacity to stand trial. See People v. Richeson, 24 Ill.2d 182, 181 N.E.2d 170.

The question of whether petitioner was competent to stand trial could have been presented to the respective trial courts. Petitioner raises no new matters which were not readily accessible for consideration there. The doctrine of res judicata therefore applies, barring a consideration of the competency question at this late date. (People v. Derengowski, 44 Ill.2d 476, 256 N.E.2d 455.) The records further disclose nothing fundamentally unfair with regard to applying the doctrine of res judicata in the instant matters since none of the evidence presented nor any actions by the petitioner disclose that he was not competent to stand trial for the offenses charged. (People v. Lighting, 13 Ill.App.3d 231, 300 N.E.2d 496; see, e.g., People v. Hamby, 32 Ill.2d 291, 205 N.E.2d 456.) The "special circumstances" necessary for the relaxation of the doctrine of res judicata do not here exist.

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The cases cited by petitioner in support of his position in this regard are inapplicable on their facts: People v. Thomas, 43 Ill.2d 328, 253 N.E.2d 431; People v. McLain, 37 Ill.2d 173, 226 N.E.2d 21.

For these reasons, the judgments of the circuit court of Cook County are affirmed.

JUDGMENTS AFFIRMED.



57873

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
ELMORE JORDAN, JR.,)
)
Defendant-Appellant.)

16 I.A. 31 178
APPEAL FROM THE
CIRCUIT COURT
OF COOK COUNTY.
HONORABLE
KENNETH R. WENDT,
Presiding.

PER CURIAM * (First Division, First District):

Following a bench trial, the defendant, Elmore Jordan, Jr., was convicted of robbery in violation of Ill.Rev.Stat. 1969, ch. 38, par. 18-1, and was granted probation for 36 months. Following his subsequent conviction for Rape in Indictment 71-2505 his probation was revoked and he was sentenced to not less than one nor more than twenty years in the Illinois State Penitentiary, the sentence to be concurrent with that imposed for Rape. On appeal, he contends this sentence was excessive and asks that this court reduce the punishment pursuant to the authority vested in it by Supreme Court Rule 615.

At the original hearing on October 28, 1970, the State offered no evidence in aggravation and in mitigation the defense pointed out that the accused had no prior record and was soon to be qualified as a repairman for Illinois Bell. Although the trial judge initially indicated his intention to "give" the defendant thirty days in the House of Correction because the victim "was knocked down" when told that doing so would jeopardize the defendant's job, the judge placed defendant on three years probation. At the hearing on June 7, 1972, defendant admitted that he was convicted of Rape and sentenced to from twenty to sixty years in the Penitentiary, but he and his attorney argued that he was innocent of these charges and that the case was on appeal. When the judge

* Mr. Justice Hallett did not participate.

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indicated that despite the appeal, probation would be revoked and that a sentence of one to twenty years would be imposed, the Assistant State's Attorney objected and recommended "five to fifteen" adding: "I don't think you ought to go around and give the man the minimum at this time." The court replied:

"Suppose he is found not guilty of all this. Suppose the Appellate Court says the jury was prejudiced and he is not guilty. I don't want this man to suffer if he is not guilty of that other crime just because somebody thinks he is."

Defendant argues that his sentence was based not on his conviction for robbery and his record prior to that conviction but on his subsequent conviction for Rape, citing People v. Morgan, 55 Ill.App.2d 157, 204 N.E.2d 314 and People v. Smith, 105 Ill.App.2d 14, 245 N.E.2d 13. However, the record makes it clear that the judge was trying to give the defendant "a break" and, in effect, presuming his innocence of the subsequent charges and not that the judge was punishing the defendant for his alleged subsequent misdeeds. The court took notice of the fact that the Rape case was on appeal and resisted the State's argument that a minimum sentence of five years should be imposed. People v. Turner, 129 Ill.App.2d 24, 27, 262 N.E.2d 379, cited by defendant, is distinguishable because evidence in mitigation was introduced, such as testimony by the accused's employers as to his honesty. Such is not the case here; no evidence was offered in mitigation and the only argument in mitigation was that the Rape conviction was being appealed. When a sentence is within the statutory limits, as it is here, this court's authority under Rule 615 to reduce the sentence should be exercised only where the sentence is clearly disproportionate to the offense. (People v. Fox, 48 Ill.2d 239, 269 N.E.2d 720.) In

the instant case, we find that the trial court did not abuse its discretion in imposing its sentence and that this is not a proper case for exercising our power to reduce the sentence. Accordingly, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.



58142

PEOPLE OF THE STATE OF ILLINOIS)
ON THE RELATION OF THE CITY OF)
BURBANK,)
Plaintiff-Appellant,)
vs.)
CITY OF CHICAGO,)
Defendant-Appellee.)

16 I.A. 3d 134

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

Hon. Edward J. Egan,
Presiding.

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

The plaintiff, City of Burbank, appeals from an order sustaining the motion to dismiss filed by the defendant, City of Chicago, and dismissing the complaint in quo warranto, which was filed to determine the jurisdictional interest of certain territory annexed by the city of Chicago and later annexed by the city of Burbank.

The issues on appeal are: (1) whether the application and complaint for quo warranto state a cause of action; (2) whether the statute of limitations provision contained in Section 7-1-46 of the Illinois Municipal Code (Ill. Rev. Stat. 1971, ch. 24, par. 7-1-46) applies where service of notice was not given under the provisions of Section 7-1-1 of the Illinois Municipal Code; and (3) whether the trial court rightfully dismissed the complaint for quo warranto.

On September 5, 1969, the defendant adopted ordinances annexing two parcels of property, effective as of the date of adoption of said ordinances, in accordance with the provisions of Section 7-1-8 of the Illinois Municipal Code (Ill. Rev. Stat. 1971, ch. 24, par. 7-1-8.) On December 16, 1969, the defendant annexed another parcel of real estate, effective as of the date

*Mr. Justice Egan did not participate.

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of adoption of the ordinance, in accordance with the provisions of Section 7-1-13 of the Illinois Municipal Code, Ill. Rev. Stat. 1971, ch. 24, par. 7-1-13.

Plaintiff was incorporated on April 4, 1970, and included in its initial organization certain territory previously annexed by the defendant on December 16, 1969. Subsequently, the plaintiff, by ordinance, annexed on December 10, 1970 and on December 11, 1970, the same territory annexed by the defendant on September 5, 1969.

After refusal by the Attorney General of the State of Illinois and the State's Attorney of Cook County to institute a quo warranto proceeding against the defendant, the plaintiff filed its application for leave to file a complaint in quo warranto, which was subsequently granted by the trial court and a complaint was filed. The application alleged that the defendant failed to comply with the statutory notice requirement of Section 7-1-1 of the Illinois Municipal Code (Ill. Rev. Stat. 1971, ch. 24, par. 7-1-1.) Neither the application nor the complaint alleged in what respect the defendant did not comply with Section 7-1-1. It was not until the plaintiff filed a motion for summary judgment that it alleged the defendant did not serve notice as required by Section 7-1-1 upon the Burbank Manor Fire Protection District and the South Stickney Public Library District. Neither of these entities is a party to the present quo warranto proceeding and neither has in any manner objected to the annexations or taken steps to oust the defendant from the territories annexed.

The defendant filed a motion to strike and dismiss the complaint in which it alleged, among other things, that the plaintiff failed to bring suit within the statutory limitation period as provided by Section 7-1-46 of the Illinois Municipal Code (Ill. Rev. Stat. 1971, ch. 24, par. 7-1-46) and that the present

proceedings are a collateral attack on the annexations of the territory by the defendant.

Although neither party has raised the issue of whether the application and complaint for quo warranto state a cause of action this court will examine the application and the complaint to determine this issue.

A complaint in quo warranto is subject to the provisions of the Civil Practice Act (Ill. Rev. Stat. 1971, ch. 112, par. 15.) Section 31 of the Civil Practice Act (Ill. Rev. Stat. 1971, ch. 110, par. 31) provides in part that "This section does not affect in any way the substantial averments of fact necessary to state any cause of action either at law or in equity." In Psychogios v. Village of Skokie, 4 Ill. App. 3d 186, 280 N. E. 2d 552, this court held that a complaint must allege facts which are sufficient to state a cause of action. Also see Bauscher v. City of Freeport, 103 Ill. App. 2d 372, 243 N. E. 2d 650 and Zamouski v. Gerrard, 1 Ill. App. 3d 890, 275 N. E. 2d 429.

In the case at bar, the gist of the application and the complaint is that the defendant failed to comply with the statutory notice requirements of Section 7-1-1 of the Illinois Municipal Code (Ill. Rev. Stat. 1971, ch. 24, par. 7-1-1) which provides in part as follows:

"When any land proposed to be annexed is part of any Fire Protection District or of any Public Library District, the Trustees of each District shall be notified in writing by certified registered mail before any court hearing or other action is taken for annexation."

In People ex rel. Vanderhyden v. Village of Elwood, 5 Ill. App. 3d 590, 284 N. E. 2d 668, the court held that an application for leave to file a quo warranto complaint must be full, positive

and convincing and, therefore, sustained the action of the trial court in denying the petition to file a complaint in quo warranto which alleged that the plaintiffs were taxpayers without setting forth an "interest" which would permit them to maintain the action.

In the case at bar, the application and the complaint are not full, positive and convincing and both fail to show in what manner the defendant failed to comply with Section 7-1-1 of the Illinois Municipal Code. Neither the application for leave to file a complaint in quo warranto nor the complaint alleges how or in what manner the defendant allegedly violated the provisions of Section 7-1-1. Neither alleges that there was a Fire Protection District nor a Public Library District within the boundaries of the territory at the time of annexation to the defendant nor the names of the districts located within the boundaries of the territory on which the defendant allegedly failed to serve notice as required by Section 7-1-1. It was not until the plaintiff filed its motion for summary judgment, supported by affidavit, that the plaintiff first alleged that the defendant failed to serve notice upon the Burbank Manor Fire Protection District and the South Stickney Public Library District. It appears as a matter of law that neither the application nor the complaint for quo warranto states a cause of action, and an objection could be made thereto at any time by any means, and could be raised for the first time on appeal to this court. Psychogios v. Village of Skokie, 4 Ill. App. 3d 186, 280 N. E. 2d 552.

However, since the issue of whether the complaint stated a cause of action was not raised by the parties, the court will consider the validity of the legal basis upon which the trial court dismissed the complaint for quo warranto. The plaintiff contends that the annexations by the defendant were null and void

because the defendant failed to comply with the provisions of Section 7-1-1 and, therefore, the defendant lacked jurisdiction over the subject matter at the time of said annexations. The plaintiff concludes that consequently the limitation provisions of Section 7-1-46 are inoperative.

The plaintiff, in relying on Section 7-1-1, ignores the fact that the annexation of the territory by the defendant was in compliance with Section 7-1-8 and 7-1-13 of the Illinois Municipal Code. Neither the Burbank Manor Fire Protection District nor the Stickney Township Library District filed an action contesting the annexation of the territory by the defendant and neither has ever objected to the annexation. Further, the Attorney General of the State of Illinois and the State's Attorney of Cook County, Illinois, refused to file a quo warranto proceeding, contesting the annexation of the territory by the defendant, within one year after the date such annexation became final. Also, the plaintiff was not incorporated at the time the annexation became final and, therefore, it could not legally be harmed at the time of the annexation. Further, although the plaintiff was organized on April 4, 1970, it waited until January 4, 1971, to file its application, more than one year after the annexations became final. Under similar circumstances, the courts have held that a quo warranto proceeding instituted more than one year after the date the annexation became final is barred by the statute of limitations provision of Section 7-1-46. Flynn v. Stevenson, 4 Ill. App. 3d 458, 281 N. E. 2d 438; People ex rel. Village of Lake Bluff v. City of North Chicago, 5 Ill. App. 3d 142, 282 N. E. 2d 780, certiorari to the United States Supreme Court denied U.S.L.W., vol. 41, p. 3462.

Plaintiff relies on People ex rel. Hopf v. Village of Bensenville, 132 Ill. App. 2d 907, 272 N. E. 2d 50 and Hall Township High School District No. 502 v. County Board of School Trustees, 80 Ill. App. 2d 475, 225 N. E. 2d 28. Also see People ex rel. Milos v. Kutschke, 42 Ill. 2d 405, 247 N. E. 2d 423.

The foregoing cases are inapposite to the facts in the case at bar. In the Bensenville case, the question of lack of notice was raised by the State's Attorney in the original quo warranto proceeding, while in the case at bar the quo warranto proceeding is a collateral attack, instituted more than one year after the completed annexations of the territory by the defendant. The Hall Township case involved the detachment of a school district while the Milos case involved the conversion of two public libraries in Cook County into public library districts. In each case suit was instituted within the time permitted by law. Here, the defendant, pursuant to Section 7-1-8 of the Illinois Municipal Code (Ill. Rev. Stat. 1971, ch. 24, par. 7-1-8), enacted ordinances annexing parcels of territory on September 5, 1969, which annexation took effect and became final on that date; and pursuant to Section 7-1-13 of the Illinois Municipal Code, the defendant also annexed a parcel of territory of less than 60 acres on December 16, 1969, which annexation ordinance took effect and became final on said date. No action was filed or attempted to be filed by anyone contesting the aforementioned annexations within the one year statute of limitations provision of Section 7-1-46 until the plaintiff, which was not incorporated until April 4, 1970, approximately seven months after the first two annexations became final and approximately four months after the third annexation became final, filed this collateral proceeding.

It has been held that the legality of proceedings by which additional territory is added to a municipality cannot be inquired into except upon a direct quo warranto proceeding. (Village of Bridgeview v. City of Hickory Hills, 1 Ill. App. 3d 931, 934, 274 N. E. 2d 925, United States certiorari denied 407 U. S. 921.) It has also been held that the question of the legality of annexation cannot be inquired into in a collateral proceeding. (Flynn v. Stevenson, 4 Ill. App. 3d 458, 281 N. E. 2d 438.) In

the case at bar, the owners of the property within the annexed territory requested by petition to be annexed to the defendant pursuant to Section 7-1-8 and Section 7-1-13 of the Illinois Municipal Code. Neither the Burbank Manor Fire Protection District nor the Stickney Township Library District took any action to contest the annexations of the territory by the defendant. Whether leave to file a complaint should be granted or withheld lies in the sound discretion of the trial court which may consider all of the circumstances and conditions, the motives of the plaintiff in having the proceeding instituted and whether the public interest will be served or damaged by permitting the quo warranto action to continue. People ex rel. Vanderhyden v. Village of Elwood, 5 Ill. App. 3d 590, 592, 284 N. E. 2d 668.

The record clearly shows that the present quo warranto proceeding is a collateral attack by the plaintiff on the annexations by the defendant of the territory involved; that the plaintiff was motivated by its personal interest; and that no public interest will be served by permitting the quo warranto action to continue. Therefore, the trial court properly sustained the motion of the defendant to strike the complaint and to dismiss the quo warranto proceeding.

The judgment of the trial court is affirmed.

Judgment affirmed.

16 I.A. 196
FILED

169

No. 70-169

DEC 16 1970

LOREN J. STONE, Clerk of Court
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court for the 16th Judi-
v.	)	cial Circuit, Kane
	)	County, Illinois.
JACK LEON COMPTON,)	
)	
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

On March 3, 1970, defendant moved to withdraw his plea of not guilty and pleaded guilty to the charge of Murder in violation of Ill.Rev.Stat. 1969, ch. 38, pars. 9-1(a)(1)(2) and (3). He was sentenced to 14-20 years imprisonment. On appeal, defendant contends that his conviction should be reversed because the trial court improperly admonished him as to the consequences of his plea and failed to determine whether the plea was voluntary, as required by Supreme Court Rule 401(b) (Ill.Rev.Stat. 1969, ch. 110A, par. 401(b)) and related provisions. Ill.Rev.Stat. 1969, ch. 38, pars. 113-4(c) and 115-2(a)(2).

The record of the proceedings on the guilty plea reveals the following colloquy between the court, the defendant, defendant's privately retained counsel and the State's Attorney:

(Defense Counsel) "May the record show that we have had several conferences with Mr. Compton concerning the subject matter of this indictment. And as a result of those conferences, Mr. Compton informs us that he now desires to withdraw his plea of not guilty heretofore entered and to enter a plea of guilty to this indictment.

Let the record further show that we have advised him of his right to a trial by a Jury; we have advised him of his right to a trial by the Court; we have conferred with him with reference to the possibilities under such a plea as this and he has advised us that he persists in his plea of guilty.

THE COURT: Now, before accepting the motion to withdraw your plea of not guilty and enter a plea of guilty, *** (the court then asked defendant a number of questions concerning his background, family, and satisfaction with the representation provided by his attorney, continuing);

You have no fault to find with their effort in your behalf in this particular case?

THE DEFENDANT: No, sir.

THE COURT: You feel that they have thoroughly investigated every possible defense that might be available?

THE DEFENDANT: Yes, sir.

THE COURT: And it is your understanding that if you enter a plea of guilty and waive your personal rights of a trial before the Court or a trial before a Jury that you could be sentenced to serve some time in a penal institution? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And knowing all of those things, is it your personal desire to waive your right of a trial by a Jury or a trial before the Court and enter a plea of guilty?

THE DEFENDANT: Yes, sir.

THE COURT: And it is my understanding -- or my notation that you have heretofore previously given a three-page written statement to some law enforcing officers; am I correct in that?

THE DEFENDANT: Yes, sir.

THE COURT: And you also made an oral statement to certain police officers?

THE DEFENDANT: Yes, sir.

THE COURT: When those statements were made, was there any threats or any promises, or any duress used against you to induce you to make those statements?

THE DEFENDANT: Not to an extent, no.

THE COURT: Were they freely and voluntarily made by you and made with the knowledge that they might be later used against you?

THE DEFENDANT: Yes, sir.

THE COURT: So that in sum and substance you have sort of put the handcuffs on your own attorneys; right?

THE DEFENDANT: Yes, sir.

THE COURT: And, again, it is your desire to withdraw your plea of not guilty and enter a plea of guilty?

THE DEFENDANT: Yes, sir.

THE COURT: All right; we will grant your motion, Counsel, and a plea of guilty will be substituted for a plea of not guilty.

LOREN J. STONE, Clerk of Court
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) Appeal from the Circuit
) Court for the 16th Judi-
v.) cial Circuit, Kane
) County, Illinois.
JACK LEON COMPTON,)
)
Defendant-Appellant.)

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

On March 3, 1970, defendant moved to withdraw his plea of not guilty and pleaded guilty to the charge of Murder in violation of Ill.Rev.Stat. 1969, ch. 38, pars. 9-1(a)(1)(2) and (3). He was sentenced to 14-20 years imprisonment. On appeal, defendant contends that his conviction should be reversed because the trial court improperly admonished him as to the consequences of his plea and failed to determine whether the plea was voluntary, as required by Supreme Court Rule 401(b) (Ill.Rev.Stat. 1969, ch. 110A, par. 401(b)) and related provisions. Ill.Rev.Stat. 1969, ch. 38, pars. 113-4(c) and 115-2(a)(2).

The record of the proceedings on the guilty plea reveals the following colloquy between the court, the defendant, defendant's privately retained counsel and the State's Attorney:

(Defense Counsel) "May the record show that we have had several conferences with Mr. Compton concerning the subject matter of this indictment. And as a result of those conferences, Mr. Compton informs us that he now desires to withdraw his plea of not guilty heretofore entered and to enter a plea of guilty to this indictment.

Let the record further show that we have advised him of his right to a trial by a Jury; we have advised him of his right to a trial by the Court; we have conferred with him with reference to the possibilities under such a plea as this and he has advised us that he persists in his plea of guilty.

THE COURT: Now, before accepting the motion to withdraw your plea of not guilty and enter a plea of guilty, *** (the court then asked defendant a number of questions concerning his background, family, and satisfaction with the representation provided by his attorney, continuing);

You have no fault to find with their effort in your behalf in this particular case?

THE DEFENDANT: No, sir.

THE COURT: You feel that they have thoroughly investigated every possible defense that might be available?

THE DEFENDANT: Yes, sir.

THE COURT: And it is your understanding that if you enter a plea of guilty and waive your personal rights of a trial before the Court or a trial before a Jury that you could be sentenced to serve some time in a penal institution? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And knowing all of those things, is it your personal desire to waive your right of a trial by a Jury or a trial before the Court and enter a plea of guilty?

THE DEFENDANT: Yes, sir.

THE COURT: And it is my understanding -- or my notation that you have heretofore previously given a three-page written statement to some law enforcing officers; am I correct in that?

THE DEFENDANT: Yes, sir.

THE COURT: And you also made an oral statement to certain police officers?

THE DEFENDANT: Yes, sir.

THE COURT: When those statements were made, was there any threats or any promises, or any duress used against you to induce you to make those statements?

THE DEFENDANT: Not to an extent, no.

THE COURT: Were they freely and voluntarily made by you and made with the knowledge that they might be later used against you?

THE DEFENDANT: Yes, sir.

THE COURT: So that in sum and substance you have sort of put the handcuffs on your own attorneys; right?

THE DEFENDANT: Yes, sir.

THE COURT: And, again, it is your desire to withdraw your plea of not guilty and enter a plea of guilty?

THE DEFENDANT: Yes, sir.

THE COURT: All right; we will grant your motion, Counsel, and a plea of guilty will be substituted for a plea of not guilty.

(State's Attorney): If it please the Court, my recollection is he was admonished as to the limits of penalty at the arraignment, but he understands and -- I mean, they have advised that the penalty could range from not less than fourteen in the pen to life or even death.

(Defense Counsel): Let the record show that we explicitly went through that with him."

The pertinent portion of Supreme Court Rule 401(b) (Ill.Rev. Stat. 1969, ch. 110A, par. 401(b)) in effect at the time of defendant's plea of guilty provided:

"The court shall not permit a plea of guilty *** unless the court finds from proceedings held in open court at the time *** plea of guilty (is) entered *** that the accused *** understands the consequences (of the charge) if found guilty ***."

The relevant portions of Ch. 38, par. 113-4(c) and par. 115-2(a)(2) require that a plea of guilty shall not be accepted until the court has fully explained to the defendant the consequences of such plea and the maximum penalty provided by law which may be imposed by the court .

Defendant argues, first, that the court's failure to personally state to him the maximum sentence which could result from his plea of guilty to the charged offense requires reversal. The State responds that the guilty plea proceedings show substantial compliance with the rules. The State notes that the court personally advised the defendant of the possible sentence at the arraignment (some four months prior to the change of plea). Further, at the time of the change of plea, defendant was advised of the consequences by the State's Attorney in the presence of the court and his counsel.

We agree that the court should have personally addressed the defendant with reference to a possible penalty at the hearing in which the guilty plea was accepted. But we do not agree that the failure to do so on this record is reversible error. The effect to be given the personal admonishment by the court at the arraignment is minimal in view of the long interval between arraignment

and the time of change of plea. (See People v. Juerke (1972), 6 Ill.App.3d 559, 562.) We find significant, however, that the penalty was reaffirmed in the defendant's presence and in the presence of his retained counsel before the close of the hearing on the change of plea and his counsel acknowledged that defendant had been so advised. (See People v. Novotny (1968), 41 Ill.2d 401, 410.) We conclude that on the whole record there was substantial compliance with the requirement that the accused understand the consequences of his plea. (People v. Miller (1972), 2 Ill.App.3d 851, 852-853.) See also People v. Larrabee (1972), 7 Ill.App.3d 726, 729, explaining People v. Weakley (1970), 45 Ill.2d 549. Per Larrabee, Weakley holds that the trial court may not rely on the required advice being given the defendant by his counsel out of the court's presence; but does not require reversal of a judgment of conviction because the trial court did not personally advise the defendant, as long as the possible penalties are made known to the defendant on the record at the time of his plea of guilty.)

Defendant raised a further issue in a supplementary brief, contending that the trial court did not properly determine that his plea was voluntarily and understandingly entered. Of some significance is the fact that defendant does not claim that his plea was coerced, nor does he refer to any facts in the record which could lead to that conclusion. (See People v. Mendoza (1971), 48 Ill.2d 371, 374.) His contention is simply that the failure of the trial court to specifically inquire whether the plea of guilty was voluntary amounts to reversible error.

It would, of course, have made a better record if the court had made the specific inquiry as to the voluntariness of the defendant's plea, but the precise language used is not determinative if the record affirmatively discloses that the defendant entered

his plea understandingly and voluntarily. See People v. Arndt (1971), 49 Ill.2d 530, 534; People v. Krassel (1973), 12 Ill. App.3d 64; People v. Shepard (1973), 10 Ill.App.3d 739.

The court's inquiry as to the circumstances of defendant's statement to the police does not in itself assure that the plea was voluntary. (See People v. Rondeau (1972), 8 Ill.App.3d 286, 288.) However, the record before us, when viewed in its entirety, including the inquiries of the court and the unequivocal answers of the defendant, affirmatively shows that the court properly determined that the guilty plea was voluntarily and understandingly entered.

Accordingly, we affirm the judgment below.

Affirmed.

GUILD, P.J. and THOMAS J. MORAN, J. concur.



58385

16 I.A. 3d 928

TONI K. HATCH,)	
)	
Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
v.)	
)	
JOHN W. HATCH,	)	HON. GLENN T. JOHNSON,
	)	Presiding.
Defendant-Appellee.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

Toni K. Hatch (plaintiff) appeals from certain portions of a judgment for divorce terminating her marriage with John W. Hatch (defendant.) The issues raised and the contentions of the parties will be set forth after the following factual statement.

The parties have three children: one girl approximately eight years old and two boys, one about six and the other about four years old. The divorce was granted pursuant to plaintiff's complaint for extreme and repeated mental and physical cruelty. Plaintiff was given the care, custody and control of the children subject to reasonable specified visitation rights.

The judgment for divorce provided that defendant should pay certain defined extraordinary medical, dental and hospital expenses for the children and that he would maintain a policy of medical insurance for their benefit. It also provided that defendant should provide for a four year college education for them if they qualified for this. Defendant was directed to maintain a group policy of insurance upon his life in the sum of \$50,000 for the benefit of the children. The judgment also directed defendant to pay plaintiff \$550 per month on the first and fifteenth days of each month "as alimony in gross and as support for the three minor children" with the last payment due on July 15, 1976. Thereafter defendant was ordered to pay child support,

divided equally between the children, in the total sum of \$400 per month. In the event of death of plaintiff prior to July 15, 1976, "the balance of payments of unallocated alimony in gross and child support shall abate in their entirety." The judgment provided that "payment of alimony in gross and child support" was unallocated with the understanding that these payments should be entirely deductible to defendant and taxable to plaintiff as regards Federal income tax, with plaintiff to be entitled to exemption for the three minor children as dependents as long as he made the specified payments. Plaintiff was to be entitled to earn up to \$10,000 gross income per year without such income being a basis for modification of child support. The judgment also divested plaintiff and defendant of all rights against the property of the other except as therein provided.

Plaintiff contends that the allowance of alimony and support in the judgment is unreasonable and should be modified; the provision for termination of her alimony on July 15, 1976, is unjustified; the court should have required defendant to pay medical and household bills previously incurred by plaintiff because of defendant's failure to support her and the children; the judgment should have directed defendant to provide reasonable household furnishings for plaintiff and the children and, since defendant had canceled a previous health insurance policy in violation of the order of the court, the judgment should have ordered him to pay additional health and hospitalization expenses previously incurred by plaintiff. Defendant urges in response that the court did not abuse its discretion in fixing the amount of alimony and child support; formulation of the allowance for support of plaintiff and the children; refusing to order defendant to pay certain of plaintiff's debts incurred before and during

the pendency of the action; refusing to order defendant to purchase household furnishings and in refusing to order defendant to pay plaintiff's future health and hospitalization expenses.

As regards the provision for alimony and child support, defendant is a qualified lawyer. The parties were married shortly after completion of his education. When the parties separated in February of 1969, defendant was earning a fixed income of \$18,000 per year gross. At the time of trial, his employment yielded him a fixed gross income of \$21,307.61 per year, which provided him with net take-home pay of \$1,397.00 per month. There is no evidence that defendant has other property or assets. However, his net income is reached after deduction for income taxes, life insurance and a health insurance policy for himself and the children. Plaintiff is not gainfully employed. There is some issue raised in this record regarding her physical condition but there is no evidence of any specific handicap or disability which would prevent her from working.

The legal principles which are to be followed in determining the propriety of the financial provisions of the judgment for divorce are long established and generally recognized. In passing upon the reasonability of alimony and child support, we are obliged to consider the standard of living of the parties and also their ages, condition of health, the property and income of the husband and the separate property and income, if any, of the wife. (Byerly v. Byerly, 363 Ill. 517, 525, 2 N. E. 2d 898. See also Sandberg v. Sandberg, 11 Ill. App. 3d 495, 499, 500, 297 N. E. 2d 654.) In determining the amount of these awards, it would not be proper for the court to consider the misconduct of the husband. Alimony and child support should not be used as a vehicle for assessment of punitive damages. (Busby v. Busby, 11 Ill. App. 3d 426, 429, 296 N. E. 2d 585 citing Byerly.)

However, the amount of these awards necessarily rests within the discretion of the trial court and this court will not set aside or modify such allowances unless we are able to state that they are contrary to the manifest weight of the evidence.

Hoffmann v. Hoffmann, 40 Ill. 2d 344, 349, 239 N. E. 2d 792 cited in Sandberg.

Careful analysis and full consideration impel us to conclude that the judgment should be modified as regards alimony and child support. Plaintiff was granted \$550 per month for support and maintenance of her three children and herself. She will be obliged to pay Federal income tax on this amount. With a gross income of \$6600, as head of a household with four dependents, plaintiff would be obliged to pay 1973 Federal income taxes of \$359, or approximately \$30 per month. Plaintiff presently pays \$230 per month as rent for living quarters for herself and the children. Deducting taxes and rent, she would be left with a net amount of \$290 per month for food, clothing, recreation, etc., for herself and the children. This is slightly under \$2.50 per day for each person. Viewed from any practical aspect, this amount is patently inadequate.

On the other hand, defendant would have his net take-home pay of \$1397.00 per month less the payment for plaintiff and children of \$550 per month so that he would have net income of \$832 per month after taxes. This is disproportionately greater for himself alone than the amount available for the entire balance of his family. Furthermore, since the unallocated payments to plaintiff and the children are deductible from income tax, defendant should receive a refund from withheld salary. We are of the opinion that this inequity should be adjusted by increasing the amount of unallocated alimony and support money to \$700 per month effective as of the date of filing of this opinion.

Another problem arises from the judgment for divorce. It describes the payments to plaintiff as "alimony in gross" and these payments are to terminate July 15, 1976. In addition, they are to abate in the event of plaintiff's death. This is a basic inconsistency. The trial court had power to provide for payment to plaintiff of periodic alimony or, alternatively, to make an award of alimony in gross. However, the court could not do both simultaneously as this judgment purports to do. If the court granted periodic alimony, the amount of the award would necessarily be subject to future modification by the court in event of change of circumstances. The statute provides that periodic alimony terminates upon remarriage. However, alimony in gross, payable in installments, does not terminate upon remarriage or death. (Ill. Rev. Stat. 1971, ch. 40, par. 19.) This is a rather difficult distinction but it must necessarily be preserved. See Overton v. Overton, 6 Ill. App. 3d 1086, 1090, 1091, 287 N. E. 2d 47 and the additional authorities therein cited, with particular reference to Roberts v. Roberts, 90 Ill. App. 2d 194, 234 N. E. 2d 372. It should also be noted that absent special circumstances the usual and customary practice is allowance of periodic alimony. Schwarz v. Schwarz, 27 Ill. 2d 140, 148, 188 N. E. 2d 673.

In the case at bar, we are of the considered opinion that the traditional concept of periodic alimony, subject to future control and modification by the court, should be applied. This will preserve the financially salutary result that plaintiff will continue to pay Federal income tax upon these payments and the amounts thereof will properly be deductible from income by defendant. The judgment for divorce is accordingly modified by striking out paragraph H. thereof and substituting the following:

"H. Defendant shall pay to plaintiff as alimony and as support for the three minor children of the parties, the sum of \$700 per month payable

in equal installments on the first and fifteenth days of each month hereafter and until further order of this court."

In addition, in view of the continued future control which the trial court will exercise over these parties, the provision in the judgment order regarding plaintiff's future earnings becomes superfluous. Therefore, paragraph J. of the judgment for divorce is stricken therefrom.

On August 17, 1970, the court enjoined defendant, until further order of court, from modifying the life and hospitalization insurance which he maintained for plaintiff and the children. On August 24, 1972, plaintiff filed a petition in which she alleged that defendant had previously maintained a health, hospitalization and accident insurance policy through the National Association of Letter Carriers. Plaintiff alleged that defendant had intentionally canceled this policy despite court order. Defendant filed an answer to this petition in which he alleged that he had changed employers after the court order but that he had maintained the coverage in question for plaintiff and their minor children with a different insurance carrier.

The judgment for divorce provided that defendant should maintain a policy of medical insurance for the benefit of the children. In January of 1972, defendant changed his employment and, therefore, he canceled the policy of health insurance which he had obtained through his former employer, the National Association of Letter Carriers. Defendant testified that he had information that his wife could not continue with the policy in event of divorce. Also, defendant did obtain health insurance covering the children through his present employer.

The court entered a separate order finding that this change of insurance was not wilful or contemptuous by defendant, and plaintiff's petition seeking to hold defendant in contempt of

court was denied. Plaintiff has appealed from this denial. Upon consideration of this matter, we cannot say that the disposition made by the trial court was not within reasonable bounds of discretion. This record fails to convince us that the insurance now provided by defendant does not constitute substantial compliance with the judgment for divorce.

Plaintiff also contends that the trial court should have made some provision in the judgment for purchase of household furnishings by her. The judgment provided that plaintiff should retain all of the household goods, furniture and furnishings in her possession as her sole and separate property. Commencing in September of 1966, and until they separated, the parties and their children had occupied a two-bedroom apartment. Plaintiff contends that the furniture which was in the apartment and thus awarded to her was inadequate and that the court should have required defendant to purchase additional furniture.

In addition, there were some unpaid household bills at the time of the judgment which defendant refused to pay. On August 17, 1970, in a temporary order for support, the court also directed defendant to pay plaintiff \$150 a month toward a group of outstanding bills in the amount of \$2752 "without prejudice to his right to contest liability for the bills." Defendant paid these installments, but outstanding bills were left at the time of the judgment in the amount of \$662.60. Plaintiff also testified that she had incurred additional bills between August 17, 1970 when the temporary order was entered and the date of the judgment (August 25, 1972) in the amount of \$1867.39. Generally speaking, these bills were for medical and household expenses.

In the judgment, the court declined to order either party to pay these expenses. Apparently the court arrived at the decision that the family creditors should be obliged to take such

action as they saw fit in a situation of this type and he, therefore, refused to require defendant to make these payments. Defendant takes the position that he had, in effect, volunteered payment of \$150 per month and that he requested that plaintiff be enjoined from incurring further charges. Plaintiff asserts that failure of the court to require payment of these bills was an abuse of discretion.

As regards the purchase of additional household furnishings and the payment of outstanding bills in both of the classifications above noted, we cannot say from the record presented to us that the disposition of these matters in the judgment for divorce was an abuse of discretion. In these regards, the judgment will be affirmed.

The judgment is modified in the particulars above specified and as modified the judgment is affirmed.

Judgment affirmed as modified.

BURKE, P. J., and EGAN, J., concur.

No. 72-63

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of
	)	Pulaski County.
vs.)	
)	
ROBERT AYERS,	)	Honorable William A. Lewis,
	)	Judge Presiding.
Defendant-Appellant.)	

PER CURIAM:

The defendant pled guilty to attempted murder and was sentenced to five to eight years in the penitentiary. A post-conviction petition was filed alleging that the defendant's guilty plea was induced by his incarceration in a county jail allegedly unfit for human habitation; the condition of the jail, according to the defendant's petition, was in violation of Ill.Rev.Stat., ch. 38, sec. 103-2(c). The defendant, in his testimony at the post-conviction hearing, also alleged that his plea was involuntary because he was promised a less severe sentence than if he demanded a trial. This appeal is taken from denial of post-conviction relief.

The Illinois Appellate Defender, appointed to represent the defendant on appeal, has filed a brief asking that the appeal be dismissed for lack of merit. The defendant was served with copies of the brief and granted leave to file documents supporting his appeal. The defendant has failed to respond.

The defendant testified at the post-conviction hearing, but did not state that the alleged poor conditions in the county jail caused him to plead guilty. The defendant made very clear, in fact, that he plead guilty for another reason:

The Defendant: There was no promises made to me only to plead not guilty and not to get that twenty years. That was the only promise made to me. That is why I pleaded guilty.

The defendant's testimony regarding his stay in the county jail was self-contradicting in large part. Much of his testimony demonstrated that some aspects of his alleged discomfort were due to his unwillingness to avail himself of existing means for preserving his personal

cleanliness. Given this testimony, the trial court did not act unreasonably in determining that the defendant's guilty plea had not been induced by poor jail conditions.

It is well settled that a guilty plea is not rendered involuntary by the fact that the defendant pled guilty because he feared a more severe sentence if he did not do so. (People v. Scott, 49 Ill.2d 231, 274 N.E.2d 391; People v. Singleton, 4 Ill. App.3d 46, 280 N.E.2d 260).

For the foregoing reasons, the judgment of the trial court dismissing the defendant's post-conviction petition is affirmed.

Judgment affirmed.

Publish Abstract Only.

No. 72-316

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of
	)	Monroe County.
vs.)	
)	
JOHN P. MOORE,	)	Honorable Alvin H. Maeys, Jr.,
	)	Judge Presiding.
Defendant-Appellant.)	

PER CURIAM:

The appellant pleaded guilty to an information charging burglary, and was sentenced to two to five year's imprisonment. The Illinois Defender Project, now the office of the State Appellate Defender, was appointed counsel on appeal.

This Court having allowed a motion to modify the sentence to conform with the Unified Code of Corrections, the Appellate Defender has filed a motion pursuant to Anders v. California, 386 U.S.738, 87 S.Ct. 1396, 18 L.Ed.2d 493, alleging that there is no further merit to the appeal and requesting leave to withdraw. The appellant was given proper notice and granted leave to file documents supporting his appeal; he has failed to respond.

It appears to the Court that the information was properly framed and that Supreme Court Rules 401 and 402 were sufficiently complied with in the waiver of indictment and acceptance of the plea of guilty.

Motion allowed; judgment affirmed.

Publish Abstract Only.

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Respondent-Appellee,	)	Appeal from the Circuit Court of
	)	Jefferson County.
)	
)	
HARLES RICHARD ROWE,)	
)	
Petitioner-Appellant.)	

PER CURIAM:

Charles Rowe was convicted of murder in 1961 in Crawford County and was sentenced to life imprisonment. In 1971, he filed a post-conviction petition alleging deprivation of his constitutional rights to be discussed below. The petition was denied after an evidentiary hearing and Rowe filed notice of appeal, asking leave to proceed pro se. This court granted an extension of time to file pro se briefs in November, 1972, and to this time, despite repeated admonitions, no response has been received.

Before affirming or dismissing an appeal for want of prosecution or lack of merit, however, it is appropriate for the court to view the record and determine on its own, though without aid of briefs or arguments of counsel, the validity of the claims alleged in the amended petition. We deem the requirements of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, no less stringent in this situation than where appointed counsel seeks to withdraw and have the appeal dismissed for lack of merit.

Appellant's post-conviction petition alleged the following deprivations of rights: 1) that his plea of guilty was coerced by the use of illegally seized evidence and the use of illegally obtained statements of a co-defendant; 2) that his guilty plea was coerced after statements had been taken from him without advice of his right to counsel before questioning; 3) that his guilty plea was coerced by ill treatment during pre-trial incarceration; 4) that he was denied a fair trial because of lengthy delays between arrest and trial; and 5) the indictment did not charge an offense.

Many of appellant's claims involve factual matters about which extensive testimony was taken at the evidentiary hearing. From this evidence, the hearing judge determined that appellant's arguments concerning illegally seized evidence, use of illegally obtained statements of co-defendants, ill treatment, delay in prosecution, and sufficiency of the indictment were clearly contradicted by the evidence and had no merit. The decision of the hearing judge should be left undisturbed unless clearly erroneous (People v. Thomas, 51 Ill.2d 39, 280 N.E. 2d 433). Having viewed the record, we find no error in the judge's findings.

Appellant Rowe's petition asserted that his conviction should be overturned because he was not advised of his right to counsel upon arrest and that his guilty plea was prompted, in part, on the statements made to the police during subsequent questioning. It is clear that the mandates of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, were not applicable in 1961 and have been held not to be retroactive (Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895). Appellant's guilty plea was properly accepted under the rules then applicable (chapter 38, section 732, Ill.Rev.Stat. 1961).

Because appellant has chosen to proceed pro se, it is appropriate to consider the effectiveness of his counsel at the hearing. It appears that a good amended petition was filed. Counsel obviously spent great amounts of time in preparation for the hearing, conducted vigorous examination of witnesses, and concluded with a concerned, viable, good-faith argument. The hearing judge made special note of his work and commended him highly on the record for his tenacity in the representation of his client.

Having found no merit in any of appellant's arguments, we now affirm the judgment of the lower court denying post-conviction relief.

JUDGMENT AFFIRMED.

PUBLISH ABSTRACT ONLY.

FILED
JAN 2 - 1974

No. 72-9

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

Walter D. Zimmerman
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

JAMES E. EVANS and CLAIRE M.
EVANS, His Wife,

Plaintiffs-Appellees,

vs.

ELMO NIXON, formerly d/b/a/
CROWN REALTY COMPANY, ET AL.
Defendants-Appellants.

:
: Appeal from the Circuit Court of the
: Twentieth Judicial Circuit, St. Clair
: County, Illinois.
:
:
: Honorable D. W. Costello,
: Presiding Judge.

MR. JUSTICE EBERSPACHER delivered the opinion of the court:

This appeal is taken from a judgment of the Circuit Court of St. Clair County on a jury verdict for the plaintiffs in an action to recover compensatory and punitive damages and to rescind a contract.

Plaintiffs-appellees, James and Claire Evans, were purchasers under a Bond for Deed contract of real estate in Belleville. They brought this action against defendants-appellants, Earl and Barbara Markwardt, the vendors of said real estate; defendant-appellant, Virginia Geller, the real estate saleswoman who handled the sale; and defendant-appellant, Elmo Nixon, the owner of the sales agency which employed her, Crown Realty Company. The complaint charged that the Bond for Deed contract was violative of Ill.Rev.Stat., ch. 29, par. 8.22, and therefore void; and that defendants had fraudulently represented that said property was zoned commercial and that plaintiffs could conduct an insurance business from said premises, when in fact the property was zoned residential.

Since early 1969, Plaza Realty, located in O'Fallon, had an exclusive listing contract with defendants Markwardt as to the real estate in question. Plaintiffs contacted defendant Geller, who was working for Plaza at that time, and mentioned that they would like to go into the insurance business. On account of their previous

friendship, Geller introduced the plaintiffs to defendant Nixon. Nixon assisted the plaintiff James Evans in becoming a representative of the Kemper Insurance Co. and offered the services of Crown Realty to help him find a home. When plaintiffs began to look for a home, they requested Geller, who had since become employed by Crown, to handle the matter.

After receiving oral permission to do so, Geller showed the plaintiffs the Markwardt property, among several others. Plaintiffs decided to purchase the Markwardt property and, after several offers and counter-offers were made, a contract for sale under a Bond for Deed was executed with a purchase price of \$23,500. Plaintiffs made a down payment of \$3000 on execution of the contract, with the balance of the purchase price to be paid at \$145 per month. The commission on the sale of the property amounted to \$1410.

Although evidence was conflicting as to whether or not either Geller or Nixon ever represented to the plaintiffs that the Markwardt property was zoned commercially, it is undisputed that the defendants Nixon and Geller knew plaintiffs wanted to use the property for a home and insurance office. The Markwardts had occupied the premises and conducted a business therefrom for approximately twelve years. After taking possession of the property, plaintiffs operated the insurance business from the premises for about 13 months. No action was taken to stop plaintiffs from operating said insurance office, but, after making three monthly payments of \$145, plaintiffs stopped payments and demanded return of all amounts paid from the Markwardts for failure of the Bond for Deed contract to comply with Ill.Rev.Stat., ch. 29, par. 8.22.

After signing the contract plaintiff James Evans met defendant Earl Markwardt, who informed him that he would probably need a permit to erect a sign advertising his insurance business. Whereupon plaintiff went to City Hall and was told that he could not erect a sign because the property was zoned residential. Plaintiff then contacted defendant Nixon; his wife talked to defendant Geller, and forms were prepared to request a zoning variance, but the request was never actually filed.

Concerning the necessity of obtaining a variance to operate an insurance office

from said premises, there existed a difference of opinion. The building commissioner testified that a variance was necessary; however the attorney for the zoning board testified that a variance was not required.

Defendants denied all charges and were allowed to plead a set-off for the reasonable rental value of the premises during the period of occupation of the plaintiffs. A real estate agent provided the only testimony concerning the reasonable rental value of the property. At the close of all the evidence the trial court instructed the jury that it could not assess punitive damages against defendants-Markwardt. The jury then returned verdicts in favor of the plaintiffs and against the Markwardts in the sum of \$1770 for compensatory damages, against Elmo Nixon in the sum of \$1060 for compensatory and \$1500 for punitive damages, and against Virginia Geller in the sum of \$350 for compensatory and \$500 for punitive damages. Judgment was entered on the verdicts.

At the outset it is necessary to examine the nature of the action brought by the plaintiffs. They alleged that the Bond for Deed contract was violative of Ill.Rev.Sta., ch. 29, par. 8.22, and that they were fraudulently induced to enter into the contract. They prayed for a determination that the contract was void and for compensatory and punitive damages against all defendants on account of their alleged misrepresentations. This action, therefore, sounds in contract and in tort. Under the Illinois Civil Practice Act, (Ill.Rev.Stat., ch. 110, sec. 44(1)), any plaintiff may join any causes of action against any defendants. The case at bar thus presents a case in which plaintiffs seek a rescission of the contract of sale, compensatory damages in the amount of the sums already expended, and punitive damages for the fraudulent misrepresentations made by the defendants which induced plaintiffs to enter into the contract in the first place.

Defendants Nixon and Geller first argue that the trial court erred in refusing their motions at the close of defendants' case and at the close of all the evidence

for a directed verdict with respect to plaintiffs' prayer for punitive damages. Illinois law on the subject of directed verdicts is quite clear. Verdicts should be directed only where all the evidence, viewed in a light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict could ever stand. (Pedrick v. Peoria & Eastern R.R. Co., (1967), 37 Ill.2d 494, 229 N.E.2d 504; Hulsebus v. Russian, (1969), 118 Ill.App.2d 174, 254 N.E.2d 184; See also: Newman v. Spellberg, (1968), 91 Ill.App.2d 310, 234 N.E.2d 152; Guttman v. Salvaggio, (1969), 117 Ill.App.2d 375, 254 N.E.2d 637.) A motion for a directed verdict on behalf of the defendant presents a single question, whether or not there is any evidence, in the record standing alone and taken with all its intendments most favorable to the plaintiff, which tends to prove material elements of plaintiffs' case. (Larson v. Harris, (1966), 77 Ill.App.2d 430, 222 N.E.2d 566, aff'd. 38 Ill.2d 436, 231, N.E.2d 421.) Where a substantial factual dispute is disclosed by the evidence, where assessment of the credibility of witnesses may be necessary to elect between conflicting evidence, it would be erroneous to direct a verdict. Wolfe v. Whipple, (1969), 112 Ill.App.2d 255, 251 N.E.2d 77.

In the case at bar plaintiffs Evans prayed for punitive damages arguing that, because of the fraudulent misrepresentations made by defendants Nixon and Geller as to the zoning of the property in question, they were induced to enter into the Bond for Deed contract. Defendants Nixon and Geller, on the other hand, specifically denied making any representations about commercial property. Both plaintiffs and defendants Nixon and Geller presented evidence supporting their contentions. Thus we are presented with the classic case of a substantial factual dispute where it is necessary to elect between conflicting evidence and it would be improper for the trial court to direct a verdict. Furthermore defendants Nixon and Geller argue that the trial court should have allowed the motions against punitive damages because there was no proof in the record that any acts were done with malice, wantonness, willfulness or violence. However Illinois case law does not support this argument. In Madison v. Wigal, (1958), 18 Ill.App.2d 564, 153 N.E.2d 90, the court held that malice is a

question of fact for consideration by the jury within the rule precluding the allowance of punitive damages unless malice or other elements constituting aggravation are present and that it is not necessary that express malice be proved. And in Wabash, St. L. & P. Ry. Co. v. Rector, (1822), 104 Ill. 296 our Supreme Court held at 304 that "a party may recover the actual damages inflicted by the wrongdoer, but whether he may have damages in addition thereto, rests largely in discretion of the jury, under the circumstances and they should be left free to exercise their judgments in that respect." The issue of whether punitive damages may be assessed in a particular case is properly a question of law. (Knierim v. Izzo, (1961), 22 Ill.2d 73, 174 N.E.2d 157 and Burr v. State Bank of St. Charles, (1951), 344 Ill.App. 332, 100 N.E.2d 773.) By denying defendants' motions for directed verdict, the trial court in the principal case was merely exercising its discretion in determining that there was enough evidence to let the issue of punitive damages go to the jury. Therefore it was proper for the trial court to refuse defendants' motions for directed verdict with respect to the prayer for punitive damages.

Each of the defendants contend that the trial court erred in its handling of the jury instructions. Defendants Nixon and Geller argue that the court erred in refusing to give their tendered instruction number one on the award of punitive damages for fraudulent misrepresentation. Defendants Markwardt argue that the trial court erred in refusing to give their alleged tendered instruction on waiver and in modifying their tendered instruction on a set-off for reasonable rental value of the premises. Although the abstract did contain Nixon's and Geller's instruction number one, neither the record nor the abstract of the record contained the alleged tendered and modified instructions of defendants Markwardt, the grounds on which the trial court based its ruling, or the conference on instructions if there was one. Defendants first set out the refused and modified instructions with their objections to the refusals and modifications in their motions for a new trial. The general rule is that error cannot be predicated upon the giving, refusal, or modification of instructions unless all of the instructions are set out in the record and abstract. (Okai v. United Roofing & Siding Co., (1960),

24 Ill.App.2d 243, 164 N.E.2d 237.) The reason for this rule is that there may have been other instructions given which cured the error complained of. (Pantlen v. Gottschalk, (1959), 21 Ill.App.2d 163, 157 N.E.2d 548, 555.) In support of their argument that the trial court erred and that we ought to consider their arguments, defendants cite the case of Ryan v. Monson, (1961), 33 Ill.App.2d 406, 179 N.E.2d 449.) In that case the court considered instructions objected to but not set out in the record, which were set out in the post-trial motion. We however choose to adhere to the general rule, because the failure of the abstract to indicate whether the tendered instruction was contained in the Illinois Pattern Instructions, the failure to show either the objections to the instructions, or the ground on which the trial court based its ruling and the failure to show any part of the conference on instructions, if any, present nothing for review on the issue whether the trial court erred in refusing the alleged specific tendered instructions. Baran v. City of Chicago Heights, (1968), 99 Ill.App.2d 221, 240 N.E.2d 331, aff'd. (1969), 43 Ill.2d 177, 251 N.E.2d 227.

In addition, defendants Nixon and Geller's instruction number one was properly refused because it was not in keeping with the Illinois law concerning the use of the Illinois Pattern Jury Instructions. (E. A. Meyer Construction Co. v. Drobnick, (1964), 49 Ill.App.2d 51, 199 N.E.2d 447.) Supreme Court Rule 239(a), (Ill.Rev.Stat., ch. 110A, sec. 239(a)), states in part that:

Whenever Illinois Pattern Jury Instructions (IPI) contains an instruction applicable in a civil case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the IPI instruction shall be used, unless the court determines that it does not accurately state the law.

In other words, it is only when the Illinois Pattern Jury Instructions do not contain a proper instruction on a subject that the court may give another instruction on the subject. (Seibert v. Grana, (1968), 102 Ill.App.2d 283, 243 N.E.2d 538, Macak v. Continental Baking Company, (1968), 92 Ill.App.2d 63, 235 N.E.2d 855.) Here the Illinois Pattern Jury Instructions did in fact contain a proper instruction, IPI 35.01 on what must be shown to sustain an award for punitive damages. The defendants Nixon and Geller did not tender it, but instead chose to make up their own. In view

of the fact that an IPI instruction was applicable in this case, if the parties desired an instruction on this issue the IPI form should have been used. (Schutt v. Terminal Railroad Association of St. Louis, (1967), 79 Ill.App.2d 69, 223 N.E.2d 264.) We therefore find for this additional reason that it was proper for the trial court to refuse to give defendants Nixon and Geller's instruction number one.

The final issue of this appeal deals with the subject of damages. All of the defendants charge error in this respect. Defendants Nixon and Geller argue that the jury was confused in assessing damages, that they improperly allocated damages against several tort-feasors, and that the damage award was not supported by the evidence. Defendants Markwardt, on the other hand, argue that the court erred in granting judgment on the verdict for compensatory damages in the amount of \$1770 against them, charging that in an action against several tort-feasors it is improper to severally assess damages, and that the verdict must show the basis upon which it was assessed, contract or tort.

The plaintiffs brought suit against all defendants to obtain a rescission of the contract and for compensatory and punitive damages. After the trial court determined that the elements of the tort of misrepresentation had not been established against the Markwardts, there still remained a cause of action against the Markwardts for rescission and for a return of the purchase money paid. In its verdict, the jury determined that compensatory and punitive damages were proper against Geller and Nixon based on their tortious conduct and that the plaintiffs were entitled to a return of the money paid in the contract action against the Markwardts. The case involves a joinder of causes of action and of parties.

With respect to the damages awarded separately against the tort-feasor defendants Nixon and Geller, the defendants are correct in asserting that, where several defendants act in concert to produce a single and indivisible injury, damages should not be apportioned and severally assessed, unless there is a reasonable means of apportionment. In this case there is no evidence in the record to support the apportionment of the \$1410 commission between Nixon and Geller. There was sufficient

evidence, however, to support the finding that both Nixon and Geller did make a misrepresentation regarding the zoning of the property. It was obviously the judgment of the jury that compensatory damages in the amount of the commission should be awarded plaintiffs from defendants Nixon and Geller; technically the jury erroneously allocated those damages between Nixon and Geller. The question of a proper remedy for such error is considered in Nichols Illinois Civil Practice, vol. 3A, §3713.1 and 46 A.L.R 3rd, Anno. p. 801. Both authorities refer to Illinois cases in which such error was held to not be properly corrected, by the trial court, by entry of a single judgment against all defendants totalling the sum of the apportioned amounts. However, an examination of those cases discloses that such procedure was not approved in those cases because of the inability to determine the jury's intent as to the total amount of damages. Here, however, we are not confronted with such a situation; the only evidence supporting compensatory damages against defendants Nixon and Geller was in the amount of the commission of \$1410 which they had procured from plaintiff by reason of their alleged misrepresentation. Since it was the jury's judgment that Nixon and Geller were responsible to plaintiffs for \$1410 compensatory damages we will modify those judgments for compensatory damages to provide a single judgment for compensatory damages in the amount of \$1410 against Nixon and Geller. This we consider as proper action under the particular circumstances of this case, pursuant to Supreme Court Rule 366(a)(5). (Ch. 110A, §366(a)(5)). Because there is support in the record for the individual assessment of punitive damages there is no need to modify the awards of punitive damages.

The action against defendants Markwardt was solely on the contract and that against defendants Nixon and Geller was in tort. Defendants Markwardts' argument concerning the assessment of damages against joint tort-feasors is therefore not applicable to them, and is answered above as it may apply to defendants Nixon and Geller.

The final argument presented by defendants Nixon and Geller and defendants Markwardt charge that the jury was confused in assessing compensatory damages in

that the damages were not supported by the evidence is also without merit. Plaintiffs prayed for a return of the \$3000 down payment and the three monthly payments of \$145 each, making a total of \$3435. The total sum of compensatory damages awarded was \$3180. As already mentioned the sum total of the compensatory damages against defendants Nixon and Geller equals their commission of \$1410. They point out that the amount of the compensatory damages awarded to the plaintiffs was less than that prayed for. However, this argument affords them no relief. Plaintiffs do not complain and the law does not provide this as grounds for reversal. In Hunter v. Winter, (1932), 368 Ill.App. 437, plaintiff sued to recover rental value of some premises and received a judgment for less than the amount of his claim. The plaintiff, however, did not complain and when defendant urged this as a basis for reversal, the appellate court stated, at 438, that "defendants point out that the amount of the verdict is less than the amount which plaintiff claims, but we do not see that defendants can urge this as grounds for reversal." Therefore, the jury was not as misguided and confused as defendants would have us believe.

This court has addressed itself to all issues argued by the defendants on appeal. All other points not argued in defendants' briefs have been waived, pursuant to Supreme Court Rule 341(e)(7).

Therefore, we modify the judgments of the trial court for compensatory damages against both defendants Nixon and Geller and enter herein one judgment in favor of plaintiffs James E. Evans and Claire M. Evans against Elmo Nixon and Virginia Geller defendants, for \$1410 in compensatory damages.

Accordingly, the judgment of the Circuit Court is modified and affirmed as modified.

G. MORAN, P.J. and CREBS, J. CONCUR

PUBLISH ABSTRACT ONLY

No. 72-275

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JAN 20 1977
31-62-1

PEOPLE OF THE STATE OF ILLINOIS,)	
Plaintiff-Appellee,)	Appeal from the Circuit Court of
	Madison County.
v.)	
RICHARD PROVINCE,)	Honorable John Gitchoff,
Defendant-Appellant.)	Judge Presiding.

Per Curiam:

The defendant pled guilty to the crime of involuntary manslaughter in the circuit court of Madison County and was sentenced to a minimum of one year and a maximum of six years in the penitentiary.

He contends in this appeal that the trial court failed to inquire into the factual basis for the guilty plea as required by Supreme Court Rule 402(c), Ill. Rev. Stat., ch. 110A, par. 402(c) which reads:

"The court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea."

The record in this case does not contain any indication of how or if the trial court satisfied itself that a factual basis for the plea existed. Although the absence of such evidence from the record does not conclusively eliminate the possibility that the trial court may have investigated and satisfied itself in some manner not reflected in the record, the total lack of any reference to how or if this was done is ground for reversal. (Supreme Court Rule 402(c).).

For the foregoing reason the judgment of the trial court is reversed and this case is remanded to the Circuit Court of Madison County with directions that defendant be allowed to plead anew.

Reversed and remanded
with directions.

56120

16 I.A. 397



PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM
Plaintiff-Appellee,)
) CIRCUIT COURT,
vs.)
) COOK COUNTY.
MARLENE WARREN,)
Defendant-Appellant.) HON. KENNETH E. WILSON,
Presiding.

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

The defendant, Marlene Warren, was indicted for the offenses of armed robbery (Ill.Rev.Stat. 1967, ch. 38 Par. 18-2) and aggravated battery (Ill.Rev.Stat. 1967, ch. 38, par. 12-4). At the conclusion of the trial, the trial judge, sitting without a jury, found the defendant not guilty of armed robbery but guilty of aggravated battery, and sentenced her to a term of three years probation, the first year to be served in the House of Correction subject to the work release program. Defendant appeals.

At the trial, the complaining witness, Mrs. Mildred Coleman, testified that the defendant had rented a room in her apartment for about three weeks. Mildred Coleman further testified that during May 1968, the defendant, accompanied by two other women, came to the complainant's apartment. Upon entering the apartment, the defendant verbally threatened her and then the defendant went to the front of the apartment. Mrs. Coleman heard some noise and she went to the front of the apartment where she observed the defendant breaking two of her windows with a hammer. Mrs. Coleman then went into the kitchen to phone the police. The defendant came into the kitchen, ripped the telephone off the wall, verbally threatened Mrs. Coleman again, and then the defendant went to her room. Mrs. Coleman left her apartment and went to a neighbor's apartment. While Mrs. Coleman was standing in the common hallway, she heard someone behind her and when she turned to look, she saw the defendant stab her with a switchblade knife.



Mrs. Coleman testified that at the time of the stabbing, the hallway was well lighted and that she was in a position to see the defendant "very well." During the trial, Mrs. Coleman also made an in-court identification of the defendant.

Officer Earl Parks of the Chicago Police Department was called as a witness by the People. Officer Parks testified that when he arrived at Mrs. Coleman's apartment located at 5417 South Prairie Avenue, Chicago, Illinois, on May 29, 1968, he found Mrs. Coleman in a neighbor's apartment. The officer testified that at this time he observed blood on Mrs. Coleman and also in the neighbor's apartment. The officer further testified that Mrs. Coleman told him that the defendant had stabbed her with a switchblade knife and that she had signed a previous complaint against the defendant for setting her apartment on fire. Officer Parks further testified that prior to leaving the premises, he had occasion to go into Mrs. Coleman's apartment and he observed broken windows in the front of the apartment and the fact that the telephone in the kitchen had been ripped off the wall.

Detective John Merriwether of the Chicago Police Department was called as a witness by the People. Detective Merriwether testified that he participated in the investigation of this incident and spoke to Mrs. Coleman at Provident Hospital in Chicago on May 29, 1968. He further testified that at the time he interviewed the complaining witness, Mrs. Coleman, he observed a laceration in her chest.

Willie Thompson testified as a witness on behalf of the defendant. He testified that defendant's reputation in the community in which she resides for truth and veracity was good. He further testified that defendant had a reputation for being a peaceful and law-abiding citizen.

The defendant, Marlene Warren, testified on her own behalf and stated that she had resided with Mrs. Coleman for about two weeks. Defendant stated that on May 28, 1968, a fire occurred outside her room and that she did not go back to Mrs. Coleman's apartment the day after the fire, but instead she went to her mother's home. The defendant stated that she never stabbed Mrs. Coleman nor did she break windows in her apartment.

Defendant contends that she was not proven guilty beyond a reasonable doubt. In a bench trial, the credibility of the witnesses is for the trial judge to determine (People v. Wright, 3 Ill. App. 3d 262, 278 N.E.2d 175), and the determination of the trier of fact will not be disturbed unless it is based on evidence which is so unsatisfactory as to raise a reasonable doubt as to the defendant's guilt. People v. Daugherty, 1 Ill. App. 3d 290, 274 N.E.2d 109. Moreover, as the Illinois Supreme Court stated in People v. Hampton, 44 Ill. 2d 41, 45, 253 N.E.2d 385, 387: "The testimony of a single witness, if it is positive and the witness credible is sufficient to convict even though it is contradicted by the accused."

In the present case, Mrs. Coleman testified that the defendant was the person who stabbed her. The defendant had lived with Mrs. Coleman for approximately three weeks prior to this incident and in addition Mrs. Coleman testified that the premises were "well lighted" at the time of the stabbing and that she was in a "very good" position to observe the defendant. We are of the opinion that the evidence presented was sufficient to support defendant's conviction beyond a reasonable doubt.

Defendant contends that the trial court unduly limited her cross-examination of witnesses and thereby denied her constitutional right to confront the witnesses against her and denied her

due process of law. Defendant in support of her argument has excerpted in her brief several colloquys which allegedly indicate that the trial judge unduly restricted the scope of defendant's cross-examination. Defendant in her brief also states that "Other limits on cross-examination, too numerous to mention here, denied the defendant her constitutional right to cross-examine witnesses against her, resulting in prejudicial error."

In People v. Burris, 49 Ill. 2d 98, 104, 273 N.E.2d 605, 610 the Supreme Court considered the standard of review in relation to the extent of cross-examination afforded a defendant at trial and stated:

"The extent of cross-examination with respect to an appropriate subject of inquiry rests in the sound discretion of the trial court. It is only in the case of a clear abuse of such discretion resulting in manifest prejudice to the defendant that a court of review will interfere." (People v. Provo, 409 Ill. 63; People v. Nicholls, 42 Ill.2d 91.)

In the present case, we have carefully reviewed the specified excerpts which defendant maintains indicate that her right of cross-examination was unduly restricted as well as the record as a whole. We are of the opinion that neither the specified excerpts nor the record as a whole support defendant's contention that her right of cross-examination was unduly restricted by the trial judge. The trial judge's rulings concerning the extent of cross-examination in this case appear to have been an exercise of his sound discretion and warranted under the facts and circumstances of this case and we cannot perceive any resultant prejudice to defendant.

Defendant argues that the admission of testimony concerning other unrelated offenses denied her the constitutional right to a fair trial.

Defendant complains specifically that the complaining witness,

Mrs. Coleman, was permitted to testify concerning a missing check implicating the defendant's involvement. Defendant also complains that Mrs. Coleman was permitted to testify concerning a fire which occurred in defendant's room and which resulted in Mrs. Coleman initiating a criminal complaint against defendant.

The Illinois Supreme Court in People v. Dewey, 42 Ill. 2d 148, 157, 246 N.E.2d 232, 236-37, considered the admissibility of evidence concerning the commission of other crimes and stated:

"Evidence which tends to prove a fact in issue is admissible even though it discloses that the defendant committed another crime, and evidence which establishes motive, intent, identity, accident or absence of mistake is admissible even though it may also involve proof of a separate offense. (People v. Harvey, 12 Ill.2d 88.) Also, evidence of other offenses is admissible if relevant for any purpose other than to show propensity to commit a crime. (People v. Cole, 29 Ill. 2d 501.)"

See also People v. Lehman, 5 Ill. 2d 337, 125 N.E.2d 506; People v. Thome, 111 Ill. App. 2d 215, 250 N.E.2d 9.

We are of the opinion that in the present case the admission of testimony concerning Mrs. Coleman's check and concerning a fire in her apartment was proper. Mrs. Coleman testified that approximately two or three days before the occurrence of the aggravated battery which is the subject matter of this appeal, she had a conversation with the defendant concerning the check. The defendant admitted that her husband had taken the check and that she would repay the money to Mrs. Coleman. The day after the discussion concerning Mrs. Coleman's check, a fire occurred in the defendant's room under circumstances indicating the defendant had started the fire and Mrs. Coleman filed a criminal complaint against defendant as a result of this occurrence. These two incidents, which occurred prior to the aggravated battery, we believe were admissible to show motive on the part of the defendant.

The defendant also contends that she was prejudiced when Officer Merriwether testified that at the time he was arresting the defendant, he had a police photo of defendant Warren with him.

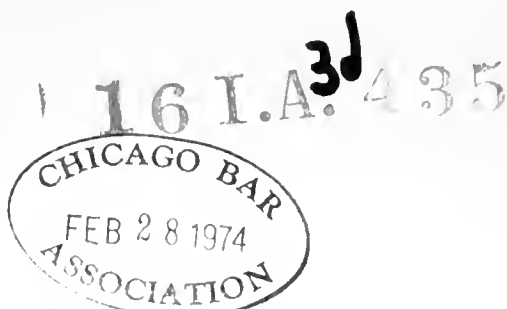
It is significant to observe, however, that at the trial defendant did not object to Officer Merriwether's testimony concerning the police photo of defendant. Generally, one who fails to object to the admissibility of evidence waives his right to complain of the admission of that evidence. People v. Lockett, 24 Ill. 2d 550, 182 N.E.2d 696; People v. Trefonas, 9 Ill. 2d 92, 136 N.E.2d 817; People v. Williams, 28 Ill. 2d 114, 190 N.E.2d 809. Moreover, the present trial was conducted by the judge and under these circumstances the trial judge is presumed to have considered only competent evidence in reaching his decision. People v. Cox, 22 Ill. 2d 534, 177 N.E.2d 211. In view of these circumstances, we are of the opinion that defendant's contention concerning Officer Merriwether's testimony is without merit.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG and HALLETT, JJ., concur.

56930



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
WALTER PARROTT,	)	ALFONSE F. WELLS,
Defendant-Appellant.	)	JUDGE PRESIDING.

Mr. JUSTICE DOWNING delivered the opinion of the court:

Walter Parrott, defendant, after a bench trial, was found guilty of the April 15, 1970 armed robbery of Michael Heller and sentenced to a term of five to ten years. On appeal the defendant contends: (1) the arresting officer had no probable cause to arrest the defendant without a warrant and to search his home, likewise without a warrant; (2) the trial court erred in denying the defendant's motion to suppress evidence; and (3) the arresting police officer's testimony substantially differed between that given at the preliminary hearing and on the motion to suppress before the trial court as the result of an admonishment by the preliminary hearing judge.

In order to understand the underlying basis of defendant's contentions, it is necessary to present a chronological summary of events.

During the latter part of April and the beginning of May, 1970, Detective Lucio Batoy (an investigator assigned to the City of Chicago Area 1 robbery unit) was investigating a pattern of robberies involving taxi cabs. A man would steal a cab, pick up passengers, and hold them up.

On April 15, 1970, at approximately 2:00 A.M., Michael Heller, while a passenger in a Yellow Cab in transit from Chicago O'Hare Airport, was robbed by a Yellow Cab driver. He immediately related the incident to the police, giving a

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description of the driver. He claimed his wallet, \$20.00, various identification cards, and briefcase were taken.

Sometime after midnight on April 24, 1970, Sharon Cocker was the victim of such a robbery. She spoke to Detective Batoy shortly after the incident at about 2:00 A.M., telling him that she had hired a Yellow Cab at O'Hare Airport and requested to be taken to the Bismarck Hotel, located in the City of Chicago. En route the driver stopped the cab and ordered her to give him all her money. She handed him her purse containing identification and a Wells-Fargo Bank cashier's check, payable to her husband, in the amount of \$3,800, then jumped out, and the cab sped away. Mrs. Cocker had also left a suitcase containing 12 of her husband's shirts in the cab. The following day she gave a description of the driver from which the police made a composite drawing. Thereafter, Detective Batoy carried the drawing in his files.

On May 2, 1970, Etta Weathers brought into a Chicago police station, a Wells-Fargo Bank cashier's check in the amount of \$3,800, payable to Mr. John A. Cocker III, and claimed she had received the check from a milkman by the name of Franklin Williams. Upon being contacted by the police on May 2, Williams came to the police station late in the evening and advised Detective Batoy that he had been given the check, in a pool room, by a friend named "Magic" with whom he had been previously arrested for a gambling offense; that "Magic" could be located in the 4300 block of Wentworth Avenue. Thereupon, Detective Batoy caused an inquiry at the police records office to determine, if possible, the name and address of the person previously arrested with Williams. In the meantime, the police, along with Williams, late in the evening of May 2, proceeded to the 4300 block of Wentworth, at which time Williams pointed out "Magic's" automobile at 4320 South Wentworth. At

about the same time, Detective Batoy, while in the police car, received a radio call from the police records office that the person arrested with Williams was "Parrott, 4318 Wentworth."

Thereupon, at about 11:00 P.M. on May 2, Detective Batoy and two other police officers proceeded to 4318 Wentworth and without a warrant, upon locating defendant, arrested him and recovered certain items. (The details of the arrest and recovery of items will be set forth later in this opinion in greater detail.)

As the result of the arrest of defendant, a preliminary hearing was held for the purpose of determining "probable cause" (see Ill. Rev. Stat. 1969, ch. 38, par. 109-1 and 3). At the preliminary hearing the following witnesses testified:

Michael Heller, called by the State, testified that about 2:00 or 3:00 A.M. on April 15, 1970, he took a cab from the Chicago O'Hare Airport; that a stop was then made for gas from a city truck; that the defendant, identified in court as the driver, then pulled off the side of the road and pulled a gun and took from Heller \$20, a wallet and briefcase that contained his army separation papers, and then departed; that Heller reported it to the police and described the driver; that about one month later he was shown one group photo of five or six persons and he identified defendant as one of the group.

Robert Walker, a detective of the Chicago Police Department, called by the State, testified that the defendant and five other men were arrested on May 2; that the prints of two fingers of defendant were positively compared with prints obtained from stolen Yellow Cabs recovered by the police department; and that an identification card of Michael Heller was recovered from the defendant along with a wallet.

Detective Lucio Batoy was called by the defendant

for the purpose of the motion. Batoy testified that he arrested the defendant in his home May 2 at 12:15 A.M. on information but had no arrest warrant; that the information consisted of the details (heretofore set forth) concerning the \$3,800 check; that when they arrived at Parrott's home, people downstairs said Parrott lived upstairs, the police officers went upstairs and, according to Batoy, "we pushed the door right on in, because the door wasn't locked," and when they got inside, Batoy noted the defendant fit the description of the composite drawing he had.

The preliminary hearing judge stated:

"Well, with all of this good investigative work, officer, I think you should have taken time to get a search warrant and also an arrest warrant and let somebody rule on the 'probable cause' involved in that type of arrest."

The court thereupon entered a finding of "probable cause" and thereupon the court and the assistant public defender, then representing the defendant, discussed the question of the motion to suppress, resulting in the withdrawal of said motion by defendant's counsel.

Upon the conclusion of the hearing, the following colloquy took place between the court and Detective Walker:

"THE COURT: You had better review this case very closely, officer.

Is that witness going to come in from out of town?

DETECTIVE WALKER: This one?

THE COURT: I am talking about the young lady.

DETECTIVE WALKER: I don't know.

THE COURT: That is your most important phase of this case."

Thereafter, the Cook County Grand Jury returned two indictments against the defendant, one (no. 70-1629) charging that defendant on April 15, 1970 committed the offense of armed robbery of Michael C. Heller, the second (no. 70-1630)

involving the alleged armed robbery on April 24, 1970 of Sharon Cocker. We are not concerned with the Sharon Cocker indictment on this appeal.

Prior to the bench trial, a hearing was conducted by the trial court on defendant's petition to suppress evidence. The petition to suppress was based on defendant's theory that defendant was arrested as the result of an unlawful entry, and the evidence obtained as the result of the unlawful entry violated defendant's rights under sections 2 and 6 of article I of the Illinois Constitution (Ill. Const. (1970), art. I, secs. 2 and 6) and the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution. Defendant's motion sought to suppress certain physical evidence taken from defendant's home, as well as defendant's fingerprints obtained after the arrest and the identification made after the arrest.

Defendant testified he was arrested at home at 4318 Wentworth on May 2, 1970 at approximately 11:30 P.M.; that he was with his brother on the second floor; that they were watching TV when the police broke in the door (which was closed and locked), asked which one was "Magic" and immediately handcuffed the defendant and his brother and started searching; that he told them his name was not "Magic," that his name was Walter Parrott; that the police took a briefcase and a couple of boxes with personal belongings in it, then went downstairs and returned with a suitcase; that the police searched the house about a half-hour and had no search or arrest warrant; that while the police were there two friends came in and were arrested and all four were taken to the police station.

The defendant further testified that he (along with the other three) was taken to two police stations; that at the second police station his fingerprints were taken about 2:00 A.M.; that about 3:00 or 4:00 the following afternoon, a lineup was conducted and then a group picture was taken; that about

7:00 to 8:00 P.M. he was taken back to the first police station where he was told he was being charged with a robbery and was questioned about a second robbery with which he was charged; that about 11-12 o'clock that night he was returned to the second police station where he stayed overnight; and that the next morning (Sunday) he was taken to Holiday Court.

The defendant further testified that he never used the name "Magic"; that prior to May 2, 1970 he had been fingerprinted and photographed by the Chicago Police Department; that he lived in a two-flat building; that as of May 2, 1970 he was 22 years old, was about 5 ft. 9-1/2 in. tall and weighed about 155 to 160 lbs. and had a natural hair style; that his brother still resided at 4318 Wentworth.

According to the defendant, the police damaged the door which was locked with a side lock, by kicking or pushing it open, causing a piece of wood to be torn off the door; that the police took a cardboard box from the closet and a Yellow Cab hat; that he formerly drove a Yellow Cab less than one year before but could not remember exactly when; that no identification card of Michael Heller, American Airline ticket, check, or State of Pennsylvania nurse registration of Sharon Cocker was found in his apartment; that the suitcase with clothes was found downstairs in a room of James Davis, which room was rented to Davis by Parrott's mother; that Detective Batoy was one of the two police officers present in the apartment.

In opposition to defendant's motion, the State called Detective Lucio Batoy who testified concerning his investigation of robberies involving cabs during the months of April and May, 1970. In addition to the facts referred to in the earlier portion of this opinion, prior to entering 4318 Wentworth, he testified that he and his partner went to the first floor door

at 4318, knocked on the door, and asked "if anyone was upstairs by the name of Parrott." A young boy responded "My brother still lives up there," whereupon the witness and his partner went up. Batoy further testified that he knocked on the door twice, someone said "come in," they entered without the use of any force and found the defendant and his brother watching television. The witness immediately recognized the defendant from the composite drawing, informed him that he was under arrest for robbery, and advised him of his constitutional rights; that sitting on top of a china cabinet was a Yellow Cab cap. He testified that they then asked defendant if they could look around the apartment and the defendant said "yes."

The defendant offered a transcript of Batoy's testimony taken at the preliminary hearing by way of impeachment on the question of how he entered defendant's apartment.

The trial court denied defendant's motion to suppress. At the bench trial the testimony of Heller and Batoy was substantially as set forth previously in this opinion. The defendant did not testify at the trial.

I.

The crucial question raised by the defendant in his appeal concerns whether the arresting officer had "probable cause" to arrest the defendant.

Under chapter 38, section 107-2(c), a police officer may arrest a person without a warrant when

"He has reasonable grounds to believe that the person is committing or has committed an offense."
(Ill. Rev. Stat. 1971, ch. 38, par. 107-2(c).)

In the case at bar, the two robberies being investigated by Detective Batoy occurred on April 15 and April 24, 1970. Prior to May 2, 1970, Detective Batoy knew only the general pattern of the robberies and had a composite drawing of the offender. On May 2, 1970, Batoy received the Wells-Fargo

check in the amount of \$3,800 which, in turn, led to the information from Franklin Williams that he had received the check from "Magic" who, it developed, was a man named "Parrott" whose address was 4318 S. Wentworth. Armed with this information, the officer proceeded to the address, asked the whereabouts of a man named Parrott, was directed to a second-floor apartment where he knocked on the door, entered with the consent of the occupant and, at that point, realized he had found the offender pictured in the composite drawing. All of these events occurred on May 2 and culminated in the defendant's arrest that same evening.

The Illinois Supreme Court, in People v. Macias (1968), 39 Ill. 2d 208, 234 N.E.2d 783, affirmed the trial court's finding that probable cause existed to arrest the defendant. There the police had descriptions of each participant in an armed robbery. After four months of investigation one of the suspects was arrested and, based on information that he had been previously arrested with a Frank Macias, the police checked with the Bureau of Identification where they found that Macias' description fit that of one of the robbers for whom they were searching. Fearing the defendant would flee if he heard a report of the arrest of the first suspect that had been broadcast on radio, the police immediately arrested the defendant at his home. In reaching its conclusion, the court noted at page 213:

"We have held that the test of probable cause is whether a reasonable and prudent man in possession of the knowledge which has come to the arresting officer would believe the person to be arrested is guilty of the crime; * * * that it is based upon the factual and practical considerations of everyday life upon which reasonable and prudent men, not legal technicians, act."

See also People v. Payne (1st Dist. 1972), 6 Ill. App. 3d 378, 286 N.E.2d 35; People v. Wright (1969), 42 Ill. 2d 457, 248 N.E.2d 78.

Defendant suggests the police should have obtained an arrest warrant. We disagree. Detective Batoy was in the process of investigating a pattern of armed robberies when, all at once, on May 2, bits of information commenced to develop which, standing alone, may or may not have been sufficient to secure a warrant for the defendant's arrest. It was only when those bits of information finally led him to the defendant's apartment and he recognized the defendant as the man depicted by the composite drawing that Batoy had sufficient information for an arrest warrant to be issued. Clearly, it would have been highly impractical for the officer to leave the premises in order to secure a warrant for the defendant's arrest. As the trial court pointed out:

"[I]f he had stopped to go and look for a judge, and so forth and so on, you know yourself that Mr. Parrott would be on his way to Timbuctoo."

Defendant's citation of Wong Sun v. United States (1963), 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 and Beck v. Ohio (1964), 379 U.S. 89, 13 L. Ed. 2d 142, 85 S. Ct. 223 is inappropriate. In Wong Sun the arresting officers broke into defendant Toy's living quarters after they had been refused entry. In the instant case, the trial court found that Detective Batoy entered the defendant's apartment with his consent. We find there is evidence to support that finding. In Beck, the arresting officers roamed the streets looking for the defendant having only a police photograph of the defendant and knowledge of defendant's previous arrest record for crimes similar to the one under investigation. The officers found defendant Beck on the street, arrested him, searched his auto, found nothing, and then took him to the police station where they searched his person before finding any evidence of criminal conduct. In the case at bar, Batoy not only entered defendant's apartment with his consent but also realized at that point that the defendant was the person depicted

in the composite drawing which had been sketched from a description given by one of the robbery victims.

We, therefore, conclude that, since Detective Batoy had reasonable grounds to believe that the defendant had committed the robberies under investigation, probable cause existed for the defendant's arrest. See People v. Clay (Illinois Supreme Court), Docket No. 44873-Agenda 37-May, 1973, ____ Ill. 2d ____, ____ N.E.2d ____.

II.

The defendant asserts that his motion to suppress was erroneously denied since at the preliminary hearing the arresting officer testified to a forceful entry into the defendant's home and said nothing about having received any permission to enter, but, having been admonished (see page 4 supra) by the preliminary hearing judge to review that aspect of the case very closely, the officer later testified to a non-forceful consent entry at the hearing on the motion to suppress.

It is immediately evident that the preliminary hearing court's remarks were directed, not to Batoy, but rather to Detective Walker. It is also evident from the context that the remark related to that judge's assessment of the importance of the testimony of Mrs. Cocker as it related to her allegations. The remark had no relationship to the manner in which Detective Batoy had entered defendant's home, whether forcibly or with consent. Further, we are satisfied from our review of the entire record that the trial court's evaluation of the testimony is supported by the record. Only the defendant testified to a forceful entry, thus presenting a question of fact for the court's determination. Since the trial court's finding was not clearly unreasonable, this court will not overturn it. People v. Fiorito (1960), 19 Ill. 2d 246, 253, 256, 166 N.E.2d 606.

III.

In his brief defendant concedes that, if Detective Batoy made a valid arrest, chapter 38, section 108-1 of the Illinois Revised Statutes¹ authorized him to conduct a search without a warrant. Since we have concluded that defendant's arrest was valid, the only point remaining for our consideration is the scope of that search.

In oral argument defendant maintained that the breadth of the search, conducted here, was so extensive that all the fruits of that search should have been excluded from admission into evidence at trial.

The defendant relies on Chimel v. California (1969), 395 U.S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034. In Chimel, the Supreme Court set out the standard to be used in evaluating the permissible scope of a search incident to a lawful arrest under the Fourth Amendment. Thus, the arresting officer may search the person of the arrestee for any weapons the latter might use to effect an escape and for any evidence subject to concealment or destruction. The officer may also search the area within the arrestee's immediate control, i.e., "the area into which an arrestee might reach in order to grab a weapon or evidentiary items" (395 U.S. at 763). Since the justification for this standard is the protection of the arresting officer and destructible evidence, the permissible scope of a search incident to a lawful arrest does not include

"[R]outinely searching any room other than that in which an arrest occurs -- or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant." (395 U.S. at 763.)

1/ The section provides as follows:

"When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of:

- (a) Protecting the officer from attack; or
- (b) Preventing the person from escaping; or
- (c) Discovering the fruits of the crime; or
- (d) Discovering any instruments, articles or things which may have been used in the commission of, or which may constitute evidence of, an offense."

In the case at bar, Detective Batoy and his partners recovered from the defendant's apartment in the room in which defendant was located at the time of his arrest, the following articles:

- (1) a Yellow Cab cap from atop a china closet within view of the police from the doorway;
- (2) an airline ticket made out to Mrs. Cocker which was inside the cap;
- (3) various identification cards belonging to Michael Heller which were contained in a small open box lying on the sofa; and
- (4) three or four shirts bearing laundry markings "Cocker" which they found within a metal clothes cabinet.

We find that the cap and identification cards recovered from the defendant's apartment were properly admitted into evidence at the trial for the armed robbery of Michael Heller from which this appeal is taken. Those articles were in plain view. See People v. Connolly (Illinois Supreme Court), Docket No. 44014-Agenda 35-May, 1973, ____ Ill. 2d ____, ____ N.E.2d ____; People v. Bombacino (1972), 51 Ill. 2d 17, 22, 280 N.E.2d 697; People v. McCracken (1964), 30 Ill. 2d 425, 429, 197 N.E.2d 35.

As Detective Batoy had probable cause to arrest the defendant in a room in which was located articles or things which may have been used in the commission of, and may constitute evidence of, the armed robberies under investigation, the removing of said articles from defendant's home was permissible under said section 108-1 of the Criminal Code.

The seizure, in defendant's mother's apartment on the first floor, of the suitcase and the remainder of the Cocker shirts, including the four shirts found in the metal clothes cabinet, did not involve evidence used in the case against

the defendant for the robbery of Mr. Heller. Therefore, it is not necessary to determine this question in this appeal.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

STAMOS, P.J., and HAYES, J., concur.

(Publish abstract only.)



58214

PEOPLE OF THE STATE OF ILLINOIS,)
 Plaintiff-Appellee,) APPEAL FROM THE
 v.) CIRCUIT COURT
) OF COOK COUNTY.
 BARNEY LONZO,) HONORABLE
) THOMAS P. CAWLEY,
 Defendant-Appellant.) PRESIDING.



PER CURIAM * (First Division, First District):

Barney Lonzo, defendant, was charged by complaint with attempt theft in violation of section 8-4 of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 8-4). After a bench trial, defendant was found guilty and sentenced to a term of 60 days in the House of Correction. On appeal, defendant argues that the complaint charging him with attempt theft is insufficient and that he was not proven guilty beyond a reasonable doubt.

For determination of this cause, a detailed recitation of the facts is unnecessary. We need consider only defendant's argument that the complaint charging him with attempt theft is insufficient in that it does not properly allege ownership of the property involved. The complaint charging defendant alleged that defendant committed the offense of attempt:

"[I]n that he with intent to commit the offense of theft, attempted to exert unauthorized control over bicycles in a bicycle storage cage, and permanently deprive the owners of those bicycles of their use and benefit."

In a complaint charging theft or attempt theft it is necessary that ownership of the property be alleged. (People v. Baskin, 119 Ill.App.2d 18, 255 N.E.2d 42.) The purpose to be served by identifying the person involved is to enable a defendant to plead either former acquittal or conviction under the indictment or complaint in the event of a subsequent

* Mr. Justice Hallett did not participate.

prosecution for the same offense. This requirement is founded upon the protection of the right of a defendant against double jeopardy and is a substantial requirement designed to safeguard an important constitutional right and is not merely a technical rule. People v. Tassone, 41 Ill.2d 7, 241 N.E.2d 419.

In the case at bar, the complaint charging the defendant with attempt theft completely failed to allege ownership of the property involved in an individual or a class. The complaint was therefore insufficient to protect the defendant against double jeopardy in the event of a subsequent prosecution for the same offense and was insufficient to charge a criminal offense.

The State relies on two cases in particular, People v. Martin, 62 Ill.App.2d 97, 210 N.E.2d 587, and People v. Bonner, 37 Ill.2d 553, 229 N.E.2d 527. In Martin, the indictment charged that the defendant attempted "to take the property of Dan Antzoulatos"; and in Bonner, the indictment charged that the defendant "attempted to compel one Delpina Tricis, * * * to submit to an act of sexual intercourse." As can be seen, neither is authority for the State's position here.

For the foregoing reasons, the judgment of the circuit court of Cook County is reversed.

JUDGMENT REVERSED.

58214

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,) APPEAL FROM THE
) CIRCUIT COURT
) OF COOK COUNTY.
 v.)
)
) HONORABLE
) THOMAS P. CAWLEY,
) PRESIDING.
)
 BARNEY LONZO,)
)
 Defendant-Appellant.)

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For the foregoing reasons, the judgment of the circuit court of Cook County is reversed.

JUDGMENT REVERSED.



58691

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
v.)	
)	
CARL DE MOON,	)	HONORABLE
	)	MARVIN J. PETERS,
Defendant-Appellant.	)	PRESIDING

PER CURIAM (FIRST DISTRICT, FIFTH DIVISION*):

Defendant was charged by complaint with contributing to the sexual delinquency of a child, in violation of section 11-5 of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 11-5). After a bench trial, defendant was found guilty and was placed on probation for a period of one year, and fined \$100 and costs. On appeal, defendant argues that the complaint is invalid; that the evidence was insufficient to establish his guilt beyond a reasonable doubt; and that the trial court erred in considering improper evidence.

At trial, the following evidence was adduced: Patricia Manzella, age 17, testified that on December 19, 1971, she was employed at DeMoon's Realty at 7430 North Avenue, Elmwood Park, as a part-time secretary. She had been so employed for four to five months. At approximately 3:00 P.M. on December 19, 1971, defendant instructed her to clean out the storage room in his office. Defendant then came into the storage area and started touching her breasts and her private parts. Defendant then offered her money to go to bed with him; he started at \$100 and went up to \$1,000. No one else was present in the office at this time. She pushed defendant away and he said, "If you are going to take this attitude, I might have to fire you." Defendant then left the office. She started to leave when she

* SULLIVAN, J., did not participate.



saw Sue Romanchuk and informed her of what had occurred. She wrote a note to defendant telling him that she wasn't going to work for him anymore and left the office. She went to her sister's house and informed her mother of what had occurred. She waited until her brother came home from work, at approximately 5:30 or 6:00 P.M., and informed him of what had occurred. The substance of neither conversation was admitted into evidence. She then went to the police station to report the incident.

Patrina Manzella, the complainant's mother, testified that on December 19, 1971, she was at her older daughter's house when her daughter Patricia came in looking very upset. She asked her what had occurred and her daughter told her what had happened. The substance of the conversation was never stated. Later that evening, she took Patricia to the police station where a complaint was signed against defendant.

Robert Olson, an Elmwood Park police lieutenant, testified that on December 19, 1971, the complainant came into the police station at approximately 7:30 P.M. After a conversation with the complainant, the state's attorney's office was contacted.

Sue Romanchuk testified for the defense that on December 19, 1971, she was employed by the DeMoon Realty Company at its North Avenue office in Elmwood Park. She arrived there at approximately 3:45. Patricia Manzella was in the office at that time. There was nothing unusual about Patricia's hair, makeup or clothing. Patricia did not say anything to her about defendant. He was not then present in the office. On cross-examination, she testified that when she came in, Patricia was leaving and she did not remember exactly what was said, if anything.

Ann Russo testified for the defense that she is employed by the DeMoon Realty Company at its Fullerton Avenue office in

Chicago. On December 19, 1971, defendant arrived at the Fullerton office at approximately 3:15 P.M. It takes approximately 20 minutes to drive between the two offices of DeMoon Realty. She noticed nothing unusual about the defendant's appearance.

Carl F. DeMoon, defendant, testified that he has been a licensed real estate dealer in the State of Illinois since 1966. Prior to that, he had been a Catholic priest. On December 19, 1971, he was president of DeMoon Realty, which had three offices. He arrived at the North Avenue, Elmwood Park, office at approximately 2:00 P.M. Patricia Manzella was there at that time. The day before, he had had a conversation with her in which she requested that he hire her sister during the Christmas holiday season. He informed her that he would not hire her sister, and Patricia stated, "I'll get even with you." On December 19, when he came into the office, Patricia was sitting at the desk smoking, wearing blue jeans and a blouse. Defendant told her to put the cigarettes away and that she should dress like a lady. A short time later, he left the office and told her to clean up the supply room and that if she didn't, he was going to fire her. Defendant denied that he ever touched the complaining witness or attempted to seduce her in any way.

Defendant's first contention on appeal is that the complaint charging him with contributing to the sexual delinquency of a child is insufficient. Defendant argues that the use of the alternative term "or" in the allegation that the defendant intended to satisfy the sexual desires of "Carl DeMoon or Patricia Manzella" lacks the specificity required by law. The offense charged in the complaint is in the language of the statute (Ill.Rev.Stat. 1971, ch. 38, par. 11-5(3)). The use of the term "or" is a fatal defect only when its use renders the statement of the offense uncertain.

People v. Smith, _____ Ill.App.3d _____, _____ N.E.2d _____ (#57370, First District); People v. Brosnan, 361 Ill. 545, 198 N.E. 708. The fact that certain words intimately associated in their meaning are stated disjunctively does not in and of itself render a complaint uncertain. People v. Rosenfeld, 25 Ill.2d 473, 185 N.E.2d 236.

In Brosnan, the defendant was convicted of contributing to the sexual delinquency of a minor. On appeal, the defendant argued that the information charging him was fatally defective in that it contained the disjunctive "or" in the expression, "to be or to become a delinquent child." The Supreme Court rejected that contention, holding that the offense was charged in the language of the statute and the use of the disjunctive "or" did not render the complaint fatally defective. The court stated: "The word 'or' is a fatal defect only where its use renders the statement of the offense uncertain."

In the case at bar, the use of the term "or" in the complaint did not render the statement of the offense uncertain and the complaint was not fatally defective. Defendant was not prejudiced in any way.

Defendant's second contention is that he was not proven guilty beyond a reasonable doubt. In reviewing a conviction for the offense of contributing to the sexual delinquency of a child, a reviewing court is charged with a special duty to exercise the utmost caution and circumspection in scrutinizing the evidence upon which the conviction is predicated. People v. Pointer, 6 Ill.App.3d 113, 285 N.E.2d 171; People v. Bryant, 123 Ill.App.2d 35, 259 N.E.2d 638. However, in examining such a charge, reviewing courts may not encroach upon the function of the trier of fact to determine the credibility of the witnesses and otherwise assess the weight of the evidence presented at trial. People v. Springs, 51 Ill.2d 418, 283 N.E.2d 225. The testimony of the prosecution

alone, if clear and convincing, is sufficient to sustain a conviction even if denied and not corroborated. People v. Halteman, 10 Ill.2d 74, 139 N.E.2d 286.

In the case at bar, the testimony of Patricia Manzella was clear and convincing, if believed by the court, as it obviously was, and it was not so unsatisfactory as to leave a reasonable doubt of defendant's guilt. People v. Henderson, 119 Ill.App.2d 403, 256 N.E.2d 84.

Defendant's final point is that the trial judge considered improper evidence in finding defendant guilty. Defendant argues that the complainant's mother was allowed to testify that the complainant had told her what had happened and that this evidence constituted inadmissible hearsay, in violation of the rule that an immediate complaint by an injured party is admissible only in rape cases.

It is correct that the substance of a complaint made by a victim of a sexual offense is admissible only in a rape case and the rule does not apply to cases of indecent liberties with a child or contributing to the sexual delinquency of a child. People v. Smith, 55 Ill.App.2d 480, 204 N.E.2d 577. Here, the mother did testify that she had a conversation with her daughter in which her daughter told her what had happened, but she was never allowed to testify as to the substance of that conversation. In People v. Meyers, 7 Ill.App.3d 82, 287 N.E.2d 11, it was held in an indecent liberties case, that evidence of delay in reporting the incident could affect the credibility of the victim. That being true, and we believe it is, then the fact of a prompt report, though not its substance, is also a matter affecting credibility.

Even if we were to consider this testimony as improper, defendant interposed no objection at trial. The rule is well established that timely objections to hearsay testimony must

be made at trial and cannot be raised for the first time on appeal. People v. Riles, 10 Ill.App.3d 772, 295 N.E.2d 234; People v. Griswold, 100 Ill.App.2d 436, 241 N.E.2d 212. Defendant now urges, however, that although there was no objection at trial, this evidence should be considered as plain error since the trial judge obviously considered this improper testimony, as evidenced by a statement made at the time of finding defendant guilty. When the trial judge announced his finding, he said:

Well, I am going to find the defendant guilty.

I am impressed by the fact that there was an immediate, or a complaint made within a reasonable period of time immediately after the alleged occurrence. And if there was some sort of conspiracy or some sort of arrangement made among the members of the family to make a complaint, to get the defendant into trouble, then there would not have been a note left and then a conference later with members of the family as to how they were going to proceed.

There will be a finding of guilty.

In making this statement, the trial judge was not referring to a complaint made by the victim to her mother, but was referring to the complaint made to the police on the evening of the incident in question. The defense was that the complaining witness had completely fabricated the story. The trial judge felt it significant that a complaint was made to the police on the same day of the occurrence. He also believed that the complaint was not a result of the conversation with the family, as evidenced by the fact that immediately after the incident, the complainant left a note to defendant. The substance of the conversation with the police officer was not admitted into evidence, nor was the substance of any of the complaining witness' conversations with anyone else admitted into evidence. Under these circumstances, we do not believe defendant was so prejudiced as to invoke the doctrine of plain error.

The judgment is affirmed.

A F F I R M E D.

(Publish abstract only.)

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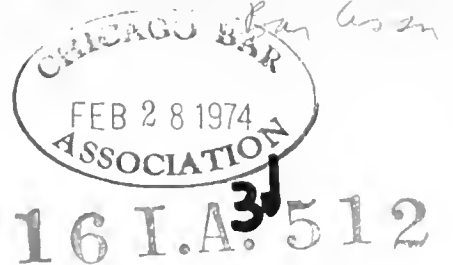
PEOPLE OF THE STATE OF ILLINOIS, ex rel.
De ELVIN CHATMAN,

Relator,

v.

JOHN J. TWOMEY, WARDEN, ILLINOIS STATE
PENITENTIARY, JOLIET, ILLINOIS,

Respondent.



) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY
)

) HON. LOUIS B. GARIPPO,
) JUDGE PRESIDING.
)

Mr. PRESIDING JUSTICE BURMAN delivered the opinion of the court.

The relator in this action, De Elvin Chatman, filed a petition pro se on March 15, 1972, seeking a writ of habeas corpus. In this petition he alleged that he was convicted on a charge of burglary in violation of his statutory (Ill.Rev.Stat.1971, ch.38, par.103-5) and constitutional right to a speedy trial. On September 7, 1972, while still incarcerated in the penitentiary, he filed another petition for a writ of habeas corpus. In this petition he again alleged that his right to a speedy trial was denied, and additionally that he was denied his right to appeal, that he was not advised of his right to appeal, and that there had been no response to a post-conviction petition which he filed. The public defender was appointed to represent him.

On April 10, 1972, the State filed a motion to dismiss on the ground that the relator had failed to bring himself within any of the provisions of Ill.Rev.Stat.1969, ch.65, par.22 that would warrant a court to discharge him on habeas corpus. The State further noted that any violation of the relator's constitutional rights alleged in his petition was not grounds for discharge on habeas corpus. After a hearing held on September 27, 1972, the trial court sustained the motion of the State and entered an order dismissing the proceedings. It is this order dismissing his habeas corpus proceedings that the relator Chatman appeals.



Subsequently, on June 29, 1973, the public defender filed a motion in this court, after serving the relator with a copy, for leave to withdraw as his counsel. In support of this motion, and pursuant to the ruling in the case of Anders v. California, 386 U.S.738, he attached a brief in which he concluded from a review of the record and a report of the proceedings, that the grounds for appeal were without merit. The relator was notified by this court of the public defender's motion to withdraw and a copy of the motion and brief was attached. The relator filed a pro se memorandum on the merits of his appeal in response thereto.

In his memorandum, relator maintains that his constitutional right to a speedy trial guaranteed by the constitutions of the State of Illinois and of the United States, and as statutorily defined under the four term statute (Ill.Rev.Stat.1971, ch.38, par.103-5), was violated. He further asserts that the failure to conduct proceedings within the limitations imposed by the four term statute constitutes a jurisdictional bar to further criminal proceedings, thereby entitling him to habeas corpus relief. Relator also maintains that his plea of guilty in those proceedings could not act as a waiver of his right to raise the issue of denial of speedy trial because that plea was not knowingly and understandingly entered and therefore void.

Section 22 of chapter 65, Illinois Revised Statutes (1971) prescribes the only causes for which a person held under the process of a court may be discharged in habeas corpus proceedings. It is now settled that a court has jurisdiction of a habeas corpus proceeding only where the original judgment of conviction was void or where something has happened since the rendition to entitle the prisoner to his release. Although the court may have jurisdiction

in the first instance to entertain the application for the writ, if it develops on the hearing that the judgment of conviction was not void, the only order the court has jurisdiction to make is one dismissing the petition. (People ex rel. Courtney v. Fardy, 378 Ill.501, 504, 39 N.E.2d 7, 8, and cases cited therein.) Thus a person imprisoned under the sentence of a court having jurisdiction of the subject matter and the person of the defendant, and power to render a judgment, cannot be discharged on habeas corpus because of irregularities in the proceedings under which he is convicted, his remedy in such cases being by writ of error. (People ex rel. Skinner v. Randolph, 35 Ill.2d 589, 590, 221 N.E.2d 279, 280; People ex rel. Georgetown v. Murphy, 202 Ill.493, 497-98, 67 N.E.226, 227.)

The relator here does not make contentions which can be disposed of on habeas corpus. He does not allege that something has happened since his conviction to entitle him to relief. Nor do the petitions filed in this cause allege any jurisdictional defects in the original trial court's decision. The failure of an accused to be brought to trial within a certain statutory time period has specifically been held under Illinois law not to be a jurisdictional defect, and thus not properly considered on habeas corpus. (People v. Utterback, 385 Ill.239, 52 N.E.2d 775; People ex rel. Nagel v. Heider, 225 Ill.347, 80 N.E.291.) And habeas corpus is not available to review claims of a non-jurisdictional nature, even though they may involve claims of denial of constitutional rights. (People ex rel. Lewis v. Frye, 42 Ill.2d 58, 245 N.E.2d 483, cert. denied, 396 U.S.912; People ex rel. Shelley v. Frye, 42 Ill.2d 263, 246 N.E. 2d 251.)

We have made an examination of all of the proceedings in accordance with the requirements of Anders and have concluded

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that there is no merit to the appeal. The public defender's request for leave to withdraw as counsel for the relator is therefore granted and the order dismissing the relator's petition for a writ of habeas corpus is affirmed.

Affirmed.

ADESKO AND DIERINGER, JJ.,

CONCUR.

(Abstract only)

NO. 58451



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
WILLIE JACKSON,	)	HONORABLE
	)	ARTHUR V. ZELEZINSKI,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

Willie Jackson (defendant) was found guilty after a bench trial of the possession of a controlled substance in violation of section 402 of the Controlled Substances Act and was sentenced to a term of nine months in the House of Correction. Ill. Rev. Stat. 1971, ch. 56-1/2, par. 1402. He appealed.

The public defender of Cook County has filed in this Court a motion for leave to withdraw as appellate counsel, supported by a brief pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, on the ground that the sole issue which could be raised on appeal — that of the legality of his arrest — is without merit and that the appeal is consequently frivolous. Copies of the motion and brief were forwarded to the defendant and he was allowed additional time in which to file any points he desired in support of the appeal. Defendant has not responded.

A Chicago police officer testified at the hearing on a motion to suppress evidence that he responded to a radio message of a 1968 Chrysler automobile being "stripped" on West Flournoy Street on July 29, 1972; that upon his arrival at that location he observed the defendant removing a wheel from a vehicle of that description; and that when the defendant observed the officer, who was in uniform, he attempted to flee and was stopped by the officer. The officer had, in the meanwhile, received a second radio message that the Chrysler vehicle had been reported stolen; the officer thereupon placed the defendant under arrest and searched him. After defendant was

transported to the police lockup he was again searched and two tinfoil packets of white powder, later determined to be .55 grams of heroin, were found in his stocking. The motion to suppress the heroin as evidence was denied and the State and the defense stipulated to the laboratory report concerning the narcotics and to the chain of possession of the contraband.

The evidence adduced at trial demonstrated that the tinfoil packets containing the narcotics were discovered on the defendant's person, which fact was admitted by the defendant on cross-examination by the State. Defendant's account of the incident was that he was placed under arrest while he was simply walking to his automobile which had been parked in front of the Chrysler vehicle after he had exited a junkyard where he sought to make a purchase. Found in the defendant's vehicle was a tape deck from the Chrysler automobile and a "lock slammer."

From the foregoing summary of the evidence adduced at the hearing on the motion to suppress it is clear that the arresting officer had probable cause to arrest the defendant on a charge relating to the Chrysler automobile, which would justify a search of his person. Appellate counsel's position that such a contention on appeal would be without merit is well taken. Further, it is settled that the police properly made a search of the defendant and a seizure of the narcotics after he was taken to the police station and before he was placed into the lockup. People v. Hambrick, 98 Ill. App. 2d 481, 240 N.E. 2d 696.

Upon an independent review of the instant record in accordance with the Anders decision, this Court has found no additional ground which could serve as a basis for the appeal.

For these reasons the motion of the public defender of



Cook County for leave to withdraw as appellate counsel is allowed and the judgment of the circuit court of Cook County is affirmed.

Motion allowed.
Judgment affirmed.

SECOND DIVISION: Justice Hayes not participating.

Publish abstract only.



58885

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
vs.	)	OF COOK COUNTY.
)	
JULIO C. SOTO,	)	HONORABLE
	)	JOHN H. McCOLLOM,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:*

Defendant, Julio C. Soto, was charged on September 30, 1970, with driving a vehicle while under the influence of intoxicating liquor in violation of Ill. Rev. Stat. 1969, ch. 95 1/2, par. 11-501; he was convicted following a bench trial and fined \$100 and \$5 costs. The single issue on this appeal is whether the evidence was sufficient to prove him guilty beyond a reasonable doubt.

Chicago Police Officer Anthony Francita testified that on September 30, 1971 [sic], he observed defendant's vehicle northbound on Kimball, apparently over the speed limit, and clocked him at 44 miles per hour in a 30 mile zone. When he stopped defendant's car, defendant got out of the car on his own. The color of defendant's face was normal, his attitude cooperative; there was no abnormal behavior or physical defect; and his clothes were orderly. However, he noticed a moderate odor of alcohol on defendant's breath and defendant's eyes were bloodshot. When asked for his driver's license, defendant "fumbled through [his wallet] and passed over it several times until he had to be shown where the license was." In walking and turning, defendant was swaying. Defendant removed the license and handed it to the officer. His balance was "wobbling" and he was thick-tongued. Defendant said that he had been to a friend's bar, arriving there at 6:45 or 7:00 P.M. and leaving about 9:30 P.M., and that he had had five or six bottles of beer to drink.

He stated he was not ill or hurt. The officer then drove defendant in defendant's car to the police station and administered certain tests. Defendant's balance was wobbling, walking was swaying, and turning was swaying. On the finger-to-nose test, defendant was hesitant on the right and completely missed on the left, and he was slow picking up coins. Officer Francita said he had been on the police force for 17 years and had numerous occasions to see people under the influence of intoxicating liquor; in his opinion, defendant was under the influence of intoxicating liquor at the time in question. On cross-examination, he stated that he stopped defendant approximately a half-block from his house; that he didn't believe there was another officer with him at the time; and that defendant stated he last ate between 4:00 and 4:30 P.M.

Defendant, Julio C. Soto, testified that he left work at 6:00 P.M. and got to the bar of his friend, Mr. Colon, at 6:30 or quarter to seven, and drank a couple of seven-ounce bottles of beer. He left and drove his own car to Mr. Colon's house where he had something to drink and played some combo; Colon's wife served dinner, and he left for home about 9:00. He was just going the speed limit and had parked near his home and was opening the door and getting out when he saw two officers. One officer then left in the squad car. The remaining officer asked for the keys to defendant's car and drove it with defendant to the police station. Defendant called his wife for bond money, and she and Mr. Colon came to the station and posted bond. He then left with his wife after the officer gave him the keys to his car. On cross-examination, he denied telling the officer he had had a meal at 4:00 P.M. He said he had had three or four bottles of beer and had told this to Officer Francita; he didn't recall telling him about five or six bottles. He said he didn't drink at his friend's house.

Defendant urges that his conviction be reversed on the basis that the police officer's testimony was contradicted by defendant and was "obviously based on an admittedly uncertain recollection on the part of the officer." It is true that the trial took place more than two years after the alleged offense, but the officer testified that he did have a recollection of the event. (In fact, in response to a question by the prosecutor on cross-examination, it was defendant who stated it was so long ago that he was unsure about his recollection.) The evidence indicated the defendant had nothing to eat for over five hours, had five or six bottles of beer, his eyes were bloodshot, he was speeding, his balance was wobbling, he was unable to produce his driver's license when asked for it. At the station he failed simple sobriety tests. Defendant offered no reasonable explanation for this behavior. Moreover, the police officer had been on the police force for 17 years and testified he had seen numerous people under the influence of intoxicating liquor. Taken together, this evidence was sufficient to prove the defendant guilty beyond a reasonable doubt. People v. Raddle (1963), 39 Ill. App. 2d 265, 188 N.E. 2d 101, cited by the State, is apposite here. As the court said in that case, the officer's testimony "taken by itself was sufficient to prove guilt beyond a reasonable doubt." Questions of the credibility of witnesses are matters for the trier of fact to determine, and his finding should not be disturbed unless the evidence is so improbable or unsatisfactory as to raise a reasonable doubt as to defendant's guilt. People v. Mann (First District, Third Division: October 18, 1973), ___ Ill. App. 3d ___, ___ N.E. 2d ___, General Number 58737, slip opinion, page 4.

Defendant makes much of the claim that Officer Francita was not alone, but was accompanied by another officer, who mysteriously left Officer Francita alone. The implication sought is that Officer

Francita then had to make an arrest in order to use defendant's car to provide himself with transportation back to the station. A more likely explanation is that the officer did not think defendant was sober enough to drive his own car.

Defendant also claims on this appeal that the officer "returned the car keys to the defendant and permitted him to drive the car home with his wife." Although defendant testified that the officer returned the keys to him, there was no testimony that the officer permitted defendant to drive his car anywhere.

The judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

*FIRST DISTRICT, SECOND DIVISION
LEIGHTON, J., did not participate.
Publish abstract only.



No. 56790

FRANK EARLY,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Petitioner-Appellant,	)	COOK COUNTY.
)	
vs.)	
)	
PEOPLE OF THE STATE OF ILLINOIS,	)	HONORABLE
	)	JOSEPH A. POWER,
Respondent-Appellee.	)	PRESIDING.

Mr. JUSTICE MCGLOON delivered the opinion of the court:

Frank Early filed a post-conviction petition in accordance with the provisions of Article 122 of the Criminal Code (Ill.Rev.Stat. 1969, ch.38, par.122-1 et seq.) seeking to vacate certain convictions based upon his pleas of guilty to indictments charging him with the offenses of armed robbery, robbery, unlawful use of weapons and sale of narcotics. The trial court, after an evidentiary hearing, denied the post-conviction petition and the petitioner appeals.

In this appeal the defendant contends that it was error for the court to deny his post-conviction petition because the evidence adduced at the post-conviction hearing allegedly shows that he was denied his constitutional right to a fair trial because the trial court failed to suspend the proceedings and conduct a hearing on defendant's competency to stand trial, when immediately after the defendant entered his pleas of guilty he stated that he was under the influence of narcotics. The State argues that the record clearly indicates that the defendant was competent to stand trial when he pled guilty to the above mentioned indictments.

We affirm.

The facts surrounding the defendant's original conviction were as follows: On November 10, 1969 the defendant appeared with counsel before Judge Francis T. Delaney. The defendant indicated his desire to withdraw his pleas of not guilty and change the same to pleas of guilty. The following discussions then took place between the court and the defendant:

THE COURT: Mr. Early, you have heard your attorney, Mr. Fowlkes advise me that at this time you are withdrawing your pleas of not guilty to these four indictments, the last number of which 69-1697 charges you with sale of narcotics and the State, without objection from your attorney, has now reduced that charge from sale of narcotics to possession of narcotics, and you are pleading guilty to that charge, possession of narcotics, is that correct, sir?

THE DEFENDANT: Yes.

THE COURT: Do you know that when you plead guilty you automatically waive your right to a trial by me, anybody sitting in my place or 12 people in that jury box?

THE DEFENDANT: Yes.

THE COURT: In other words, you get no trial whatsoever.

THE DEFENDANT: Yes.

THE COURT: Knowing and understanding that do you still persist in your guilty pleas?

THE DEFENDANT: Yes.

THE COURT: Before accepting your pleas it is my duty to advise you that under your pleas of guilty to these indictments, as follows, you are subjected to the following penalties:

Indictment 68-3805, charging you with armed robbery, and for your penalty there I may sentence you to the Illinois State Penitentiary for not less than two years and for as long as the rest of your natural life, do you understand that?

THE DEFENDANT: Yes.

THE COURT: Knowing and understanding that do you still persist in your guilty plea to that indictment charging you with armed robbery?

THE DEFENDANT: Yes.

THE COURT: Let the record show Frank S. Early, having been advised of the consequences of his plea of guilty to indictment 68-3805, charging him with armed robbery, and being so advised he still persists in his guilty plea. The plea, therefore, will be accepted and there will be a finding of guilty of armed robbery in manner and form as charged in the indictment. There will be a judgment on the finding.

Similar discussions were had between the court and the defendant as to each of the other indictments.

After all pleas of guilty were accepted by the trial court the defense stipulated to the facts alleged in the indictment and that any prospective State's witnesses would offer testimony in support of those facts. After the hearing in aggravation and mitigation the trial court imposed concurrent sentences on the various charges, the maximum of which called for imprisonment of nine to ten years in the Illinois State Penitentiary and advised the defendant of his right to appeal.

The attorney for the defendant then presented a motion that the mittimus be stayed for about ten days and that the defendant be permitted to be hospitalized in the House of Correction, at which time the following discussion took place:

Mr. Fowlkes: Your Honor, I have a motion that the mittimus be stayed here for about 10 days and the defendant be permitted to be hospitalized in the House of Correction.

The Court: Mr. State's Attorney.

Mr. Neville: We have spoken about that previously. It has to do with Mr. Early's narcotic problem and he wishes to be hospitalized at the Bridewell for a period of 10 days in order to try and cleanse his system.

The Defendant: Yes, I would like to go over there today. Right now I am under the influence of narcotics and I would like to go over there today to kick my habit. See, I'll be sick some time around a couple of hours.

Mr. Neville: We spoke about this previously and I indicated to the court at that time and Mr. Fowlkes we would have no objection to that. I suggest the mittimus be stayed for 10 days for that purpose, for him to be sent to the House of Correction Hospital.

The trial court stayed the mittimus for the requested purpose and ordered the defendant to be returned to the court on November 21, 1969.

On March 3, 1970, the defendant filed a post-conviction petition contending that his convictions should be vacated because he was under the influence of narcotic drugs

at the time he entered his pleas of guilty and, therefore, the trial court should have held a competency hearing before accepting his pleas.

A post-conviction hearing was held before Judge Joseph A. Power. The defendant testified that he injected narcotics into his system in the Criminal Court's Building washroom approximately an hour before sentencing on November 10, 1969; that he could not recall speaking to his attorney at or near the time of sentencing although he could remember going before Judge Delaney and telling him that he was under the influence of narcotics; that he remembered appearing in court with his attorney and vaguely recalled Judge Delaney pronouncing some sort of sentence but could not recall what type of sentencing the Judge was pronouncing because the defendant was "high at the time".

The defendant's wife testified that the defendant's eyes were glassy and half closed; and that in her opinion he was under the influence of narcotics when he appeared before Judge Delaney on November 10, 1969.

Richard Neville, the assistant State's attorney assigned to the case at the time the defendant pled guilty, testified that the case was before Judge Delaney six or seven times and each time he conversed with the defendant; that he noticed nothing unusual about the defendant during the various conversations and negotiations for guilty pleas; and that he did not observe anything unusual about the defendant on November 10, 1969 when the defendant changed his pleas from not guilty to guilty, which was the result of negotiations and conferences which took place over a period of time. On cross-examination, Mr. Neville stated that there was no indication during the taking of the pleas on November 10, 1969 that the defendant was unaware of what was transpiring or that he did not

understand what was taking place.

Glenn C. Fowlkes, the defendant's trial attorney, testified that it was the joint decision of the defendant and himself to negotiate for guilty pleas; that at no time did he notice anything unusual about the defendant; that the defendant was articulate and coherent in front of Judge Delaney on November 10, 1969; that Fowlkes did not think the defendant was pleading guilty because he was under the influence of drugs; and that Fowlkes would not have let the defendant plead guilty if the defendant was in fact under the influence of narcotics.

Judge Delaney testified that the defendant was competent to talk to the judge and to enter pleas of guilty; and that nothing unusual occurred at the hearing. The judge further testified that the defendant appeared normal "as anyone else who had ever appeared before" the judge.

Judge Power, in denying the post-conviction petition, addressed the defendant and stated that from "reading the record and listening to the evidence I am satisfied that you knew that you had committed a crime, you knew the crime you had committed, and you had a recollection of what went on that day in court, and you had a recollection of what went on that day beforehand"; that "there wasn't anything that indicated that you didn't know what was going on"; that "the Court was satisfied and he observed you and your counsel observed you"; that "if they thought there was anything that prevented you from understanding what you were being charged with or understanding what your sentences would be, they should have, but they didn't, because they felt as I feel now that you were competent to stand trial"; that "you did know what the crimes were that you were charged with and you did understand your sentence that was going to be imposed upon you"; that "you had made the arrangement that you wanted to have, ***".

The question of whether bona fide doubt of defendant's competency exists is within the discretion of the trial court (People v. Southwood (1971), 49 Ill.2d 228, 230, 274 N.E.2d 41); and that decision will be reversed only for an abuse of discretion (People v. Harris (1970), 47 Ill.2d 106, 109, 265 N.E.2d 644.) In order to be considered competent to stand trial a defendant must be able to understand the nature and object of the charges against him and to cooperate with counsel in conducting his defense in a rational and reasonable manner. People v. Shaw (1972), 6 Ill.App.3d 540, 286 N.E.2d 107.

In the case at bar the trial court did not abuse its discretion by determining that the facts presented at the post-conviction hearing were not sufficient to raise a bona fide doubt as to the defendant's competency to stand trial. (People v. Harris (1970), 47 Ill.2d 106, 109, 265 N.E.2d 644; People v. Durham (1973), 10 Ill.App.3d 911, 295 N.E.2d 298.) At the time the defendant changed his pleas from not guilty to guilty, Judge Delaney fully admonished the defendant as to the effect of his guilty plea to each of the several indictments, interrogated the defendant as to his understanding of his legal and constitutional rights and received coherent and understandable affirmative replies thereto. It was only after the trial court entered the respective judgments, in full accordance with the negotiated pleas, that the attorney for the defendant, at the request of the defendant, presented the motion for a stay of mittimus so that the defendant could enter the House of Correction Hospital for treatment. The defendant did not then state he was unable to understand the nature of the charges against him or that he was unable to cooperate with counsel in conducting his defense in a rational

and reasonable manner. He stated that he was going to be sick in a couple of hours and not that he was then sick. Neither the defendant nor his attorney then asked for a competency hearing. The defendant apparently made the statement to impress the trial judge of the alleged necessity that the defendant be sent to the House of Correction Hospital and not the County Jail.

The record affirmatively shows that the defendant was able to understand the nature of the charges against him and was able to cooperate with his counsel in conducting his defense in a rational and reasonable manner. The testimony of his own attorney indicates that the defendant took an affirmative and active part in the various discussions that culminated in the negotiated pleas. Further, the assistant State's attorney, the attorney for the defendant and Judge Delaney all testified at the post-conviction hearing that they did not believe the defendant was under the influence of narcotics at the time he changed his pleas to guilty.

The record in this case clearly shows that the trial court did not abuse its discretion when on November 10, 1969, it did not conduct a competency hearing after the defendant stated, subsequent to the entry of the judgments on his guilty pleas, that he was under the influence of narcotics. Also, the court did not abuse its discretion when, after an evidentiary hearing, it denied the post-conviction petition. For these reasons the judgment of the trial court is affirmed.

Order affirmed.

McNamara and Mejda, JJ., concur.

16 I.A. 533



No. 57366

THE BUCKINGHAM CORPORATION, a)	
Delaware corporation,)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
vs.	)	COURT OF COOK COUNTY.
	)	HONORABLE
LONGWOOD LIQUORS, INC., an	)	DONALD J. O'BRIEN,
Illinois corporation,	)	PRESIDING.
Defendant-Appellant.)	

MR. JUSTICE McNAMARA delivered the opinion of the court:

Plaintiff, The Buckingham Corporation, filed a verified complaint on December 15, 1971, in the circuit court of Cook County seeking preliminary and permanent injunctive relief against the defendant, Longwood Liquors, Inc., for allegedly violating plaintiff's fair trade agreement, allegedly executed in accordance with the provisions of the Illinois Fair Trade Act (Ill.Rev.Stat. 1971, ch.121-1/2, par.188 et seq.) Notice of plaintiff's application for a preliminary injunction was afforded the defendant, and after a hearing on the motion the trial court issued a preliminary injunction enjoining the defendant from wilfully and knowingly advertising, offering for sale, or selling the plaintiff's products at prices lower than those stipulated in the fair trade agreement until a trial could be conducted on the merits of the case. Defendant subsequently filed a verified answer to the complaint and later moved to dissolve the injunction. After the motion was denied, defendant brought this interlocutory appeal.

Defendant contends that the instant preliminary injunction was not sufficiently specific and detailed to conform with the requirements of Ill.Rev.Stat. 1971, ch.69, par.3-1. The statute provides in part as follows:

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; ***

The injunction entered by the trial court reads in relevant part as follows:

"THIS CAUSE coming on to be heard on the motion of Morton Siegel, attorney for plaintiff, for a temporary injunction and notice of said motion having been given to the defendant herein, the Court having before it the verified Complaint of plaintiff, having read and considered the same, and the Court having heard argument of counsel and being fully advised in the premises, and have given cause shown;

"IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the defendant, LONGWOOD LIQUORS, INC., its agents and servants, and each and every one of them be, and they are hereby jointly and severally enjoined and restrained from wilfully and knowingly advertising, offering for sale or selling BUCKINGHAM DISTRIBUTORS products, including but not limited to CUTTY SARK SCOTCH WHISKEY, in Illinois, at less than the prices stipulated by plaintiff from time to time under the Fair Trade Act of the State of Illinois, and in accordance with the contracts made pursuant to said Fair Trade Act, which contracts at the time of filing of the Complaint were, or now are, or may hereafter be in force in Illinois relating to the sale or resale of any of said beverages in that State.

Defendant argues that the above injunction is not specific in its terms, describes by reference to another document the acts sought to be restrained, and does not set forth the reasons for its issuance. The primary thrust of defendant's contention is that the failure of the order to specify by name the plaintiff's products protected and the prices to be maintained is fatal to its validity.

The precise argument, attacking similar language contained in injunctive orders, recently has been presented to and rejected by this court in several cases. (Calvert Distillers Co. v. Vesolowski (1973), --Ill.App. 3d--, No. 57532; Taylor Wine Co. v. Foremost Sales Promotions (1973), 12 Ill.App.3d 1042, 299 N.E.2d 556; Park, Benziger & Co. v. Foremost Sales, Inc. (1973), 13 Ill.App.3d 179, 300 N.E.2d 564.) This court held in the

foregoing cases that the injunctions were specific enough and that the language used would present no difficulty to anyone engaged in the liquor business. We agree with these decisions and the reasoning contained therein, and adhere to their holdings. A court must focus upon the clarity and specificity of the injunction in light of the knowledge and expertise of the party enjoined. Here the defendant was well versed and quite active in the liquor trade, and it was well aware of the obligations imposed by the injunction. We find that the present injunction sufficiently complied with the provisions contained in par.3-1. Also see Seagram-Distillers Corp. v. New Cut Rate Liquors (7th Cir. 1955), 221 F.2d 815, cert. den. 1955, 350 U.S. 828.

In regard to defendant's argument that the injunction did not properly set forth the reasons for its issuance, we observe that defendant had not filed an appearance or answer at the time of its issuance. Thus the trial judge had to rely solely upon the verified complaint in determining the merits of the application for the injunction and was precluded from taking other evidence. (H.K.H. Devel. Corp. v. Metropolitan San. Dist. (1964), 47 Ill. App.2d 46, 196 N.E.2d 494.) Since the injunction expressly stated that the trial judge relied upon the contents of the complaint, it thereby sufficiently indicated the reasons for its issuance.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

McGLOON and MEJDA, JJ., concur.



No. 58450

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)	
	)	COURT OF COOK COUNTY.
vs.)	
	)	HONORABLE
ANTHONY WATKINS,	)	THOMAS CASEY, JR.,
	)	PRESIDING.
Defendant-Appellant.)	

PER CURIAM:

Anthony Watkins, defendant, was charged by complaint with the crime of attempt theft in violation of section 8-4 of the Criminal Code (Ill.Rev.Stat. 1971, ch.38, par.804.) After a bench trial, defendant was found guilty and sentenced to a term of ten months in the Illinois State Farm, Vandalia, Illinois. Defendant appeals, arguing that he did not knowingly and understandingly waive his right to a jury trial and that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At trial, the following evidence was adduced: Paul Swannie testified that he is employed as a security officer for Carson Pirie Scott. On May 24, 1972, he was so employed at its downtown store. After a conversation with one of the clerks, he observed the defendant on his way down the escalator coming down from the second floor. He saw the defendant take a pair of trousers from underneath his coat and put them on the floor. Defendant was placed under arrest as he attempted to leave the store. A search of defendant disclosed that he had a plastic bag tucked into his trousers. The trousers, which Swannie observed the defendant take from under his coat, were introduced into evidence. A tag saying Carson Pirie Scott, \$14.99 was also introduced into evidence. Defendant was unable to produce any receipt for the trousers.

Defendant's first contention is that he did not knowingly and understandingly waive his right to a jury trial. Prior to trial, the following colloquy occurred:

"MR. KARNESIZ (assistant State's attorney): We are ready for trial.

THE COURT: Is the defense ready?

MISS HILLYARD (assistant public defender): We are ready.

THE COURT: How does the gentleman plead to the charge of theft? How do you plead?

THE DEFENDANT: Not guilty.

THE COURT: Do you wish to be tried by this court or by a jury, sir?

THE DEFENDANT: This court.

THE COURT: Swear the witnesses."

There is no precise formula for determining whether a defendant's waiver of the right to a jury trial is knowingly and understandingly made. (People v. Richardson (1965), 32 Ill.2d 497, 207 N.E.2d 453.) Each case depends upon the particular facts and circumstances of that case. (People v. Wesley (1964), 30 Ill.2d 131, 195 N.E.2d 708.) A lengthy explanation of the consequences of a jury waiver is not a prerequisite to the validity of the jury waiver. People v. Bradley (1970), 131 Ill.App.2d 91, 266 N.E.2d 469.

In the case at bar, defendant was represented by an assistant public defender. It is evident from that record that counsel had conferred with defendant prior to trial. When asked if he wished to be tried by a jury or by the court, defendant replied, "This court." The trial then proceeded without further discussion. Under these circumstances, we conclude that the defendant knowingly and understandingly waived his right to a jury trial. People v. Johnson (1971), 3 Ill.App.3d 158, 279 N.E.2d 47; People v. Lenair (1970), 130 Ill.App.2d 147, 264 N.E.2d 525.

Defendant's second contention is that the evidence was insufficient to establish his guilt beyond a reasonable doubt. Defendant argues that the evidence presented by the State failed to establish ownership of the trousers in question.

In a prosecution for theft or attempt theft, ownership or some sort of superior possessory interest in one other than the defendant is an essential element of the offense. (People v. Roach (1971), 1 Ill.App.3d 876, 275 N.E.2d 309.) However, essential elements of an offense may be proven by circumstantial evidence. People v. Rice (1969), 109 Ill. App.2d 391, 248 N.E.2d 745.

In the case at bar, the testimony of Paul Swannie, the security guard for Carson Pirie Scott & Company, established that the defendant was observed coming down the escalator from the second floor of the Carson Pirie Scott store. Defendant took a pair of trousers, which were introduced into evidence, from under his coat and dropped them on the floor. Defendant was then arrested as he attempted to leave the store. A search of defendant disclosed that he had a plastic bag on the inside of his trousers. A tag bearing the name Carson Pirie Scott and a price was also introduced into evidence. The trial judge, who saw the exhibits which were introduced into evidence, by his finding of guilty, obviously concluded that the Carson's tag was the tag for the recovered trousers. This testimony constituted sufficient circumstantial evidence to support the conclusion by the trial judge that the trousers were owned by Carson Pirie Scott & Company. People v. Thomas (1972), 9 Ill.App.3d 384, 292 N.E.2d 153.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. JUSTICE MEJDA did not participate.

16 I.A. 558



57882

HELEN HALL, Administratrix for)	
LOUIS VAN HALL, deceased,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellant,)	
)	
vs.)	
)	
KENNETH J. JOHNNIC, et al.,	)	Hon. James C. Murray,
	)	Presiding.
Defendants-Appellees.)	

PER CURIAM (FIRST DISTRICT, FIRST DIVISION):*

Louis Van Hall brought an action to recover damages suffered by the alleged negligence of the defendants in the operation of a motor vehicle. Prior to trial, Hall died from causes other than from the accident, his death was suggested of record, and Helen Hall, Administratrix, was substituted as party plaintiff. The jury rendered a verdict for the defendants, upon which the trial court entered judgment and the plaintiff appeals.

The issues on appeal are: (1) whether the trial court erred in failing to give the jury the plaintiff's requested peremptory instruction; (2) whether the verdict of the jury was so ambiguous as to make it impossible to ascertain its intentions; and (3) whether the verdict of the jury was against the manifest weight of the evidence.

On November 22, 1966, at about 7:30 in the morning, Toulin Taylor, with Louis Van Hall as a passenger, drove his station wagon off the Eisenhower Expressway to the stop sign at 25th Street, Bellwood, Illinois. The traffic at 25th Street was heavy. As Taylor waited at the stop sign, his rear bumper was hit by the tractor portion of a tractor-trailer combination which was driven by defendant Kenneth Johnnic. Taylor and

*Mr. Presiding Justice Joseph Burke did not participate.

Johnnic looked at Taylor's automobile and saw only a slight dent on the bumper, but did not see any other damage.

Taylor testified that after his automobile was hit, Hall got out and went across the street to call the police; that Taylor did not notice anything unusual about Hall at that time, but when Hall came back he was holding his back. Hall lay down on the front seat of the automobile until the police came. Hall was taken to the Westlake Community Hospital by the Bellwood Fire Department ambulance and later transferred to the Roosevelt Memorial Hospital. Johnnic testified that when Hall went to call the police Johnnic did not see anything wrong with Hall, but when Hall came back he said his back hurt and he sat down in the car.

Dr. Leonard Smith examined Hall at the Roosevelt Memorial Hospital on November 22, 1966, and found that Hall was suffering from severe back pain; that the diagnosis was not altogether clear and because Hall was anxious to return home, Dr. Smith permitted Hall to go home and rest and the doctor said he would evaluate him further at some later date. The pain got worse and on December 6, 1966, Hall reentered the hospital for another nine days. During this time he was placed in traction and received physical therapy. Eventually he was placed in a body cast. Hall was discharged on December 15, 1966, but his condition grew worse. On February 27, 1967, Dr. Smith performed surgery which consisted of a laminectomy at L-5, S-1, which is the lower level, with removal of a herniated disc at that level.

During this period Hall received physical therapy from Dr. Virginia W. Brenslahan. According to Dr. Brenslahan's records, Hall said he was a passenger in an automobile that was stopped to make a turn into an intersection when the automobile was hit in the rear by a truck, and that from this impact he was thrown to the floor of the car.

Dr. Smith further testified that Hall had a history of low back pain dating back to 1965; that on March 28, 1966, Dr. Smith performed surgery on his back for a herniated intervertebral disc; that he made a very speedy recovery from the operation; and that he returned to work within a few months.

The trial court directed a verdict for the plaintiff on the question of liability but submitted the question of damages to the jury.

The plaintiff argues that the trial court erred in refusing to give the following peremptory instruction to the jury:

"The court instructs the jury that from the evidence offered herein, the plaintiff has sustained her burden of proof on the issue of liability and it is, therefore, your duty to return a verdict for the plaintiff."

However, neither the record nor the abstract shows that the peremptory instruction was tendered to the trial court for consideration at the instruction conference. The law is clear that the record and abstract must contain all of the instructions offered, given and refused. People v. Woodruff, 9 Ill. 2d 429, 137 N.E.2d 809; Bear v. Holiday Inns of America, 1 Ill. App. 3d 786, 275 N.E.2d 457; Jacobs v. Holley, 3 Ill. App. 3d 762, 763, 279 N.E.2d 186.

The only place that the peremptory instruction appears in the record is in the post trial motion. The failure to present the instruction at the time of the instruction conference cannot be cured by making a point later in the post trial motion. Delany v. Badame, 49 Ill. 2d 168, 178, 274 N.E.2d 353; Russo v. Kellogg, 37 Ill. App. 2d 336, 342, 185 N.E.2d 377.

Since the record or the abstract does not contain the proposed peremptory instruction, which the trial court allegedly refused to give to the jury, the question of whether the trial court erred in refusing to give the instruction is not subject to review by this court.



Plaintiff contends that the verdict of the jury was so ambiguous it was impossible to ascertain the jury's intentions.

Only one form of verdict was submitted to the jury which provided:

"We, the jury find in favor of the plaintiff and against all of the defendants and assess the plaintiff's damages in the sum of _____ dollars."

The jury scratched out the words "plaintiff and against all of the defendants" and inserted in lieu thereof "defendants" and inserted the word "none" in the space for the amount of damages. So the verdict, signed by the 12 jurors, read:

"We, the Jury, find in favor of the defendants and assess the plaintiff's damages in the sum of None."

The plaintiff argues that the trial court directed the jury to find for the plaintiff on all the liability issues and that the sole function of the jury was to assess the plaintiff's damages; that the jury by inserting the word "none" in its verdict clearly indicates that the jury "either didn't understand or disregarded" the trial court's direction to assess the plaintiff's damages and, therefore, it was the duty of the trial court to set the verdict aside.

The defendants argue that the trial court found for the plaintiff on the issue of defendant's negligence and upon the issue of the plaintiff's contributory negligence, but left to the jury the question of whether Hall was injured by reason of the accident and whether the negligence of the defendants was the probable cause of the injury. The defendants further argue that the verdict of the jury is in accordance with Plaintiff's Instruction No. 10, which provided as follows:

"The plaintiff has a burden of proving each of the following propositions:

First: That the plaintiff was injured;

Second: That the negligence of the defendants was a proximate cause of the injury to the plaintiff.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff, but, if, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendants."

The jury's verdict is in accordance with Plaintiff's Instruction No. 10. It is apparent from said verdict that it was the opinion of the jury that either Hall was not injured or if he was injured that the negligence of the defendants was not the proximate cause of his injury and, therefore, the jury properly rendered its verdict for the defendants.

The test of the validity of a general verdict is whether or not it expresses the intent of the jury so that the trial court can understand it and enter judgment thereon (Gille v. County Housing Auth., 44 Ill. 2d 419, 424, 255 N.E.2d 904.) In considering the verdict with a view to its sufficiency, the first object is to ascertain what the jury intended to find and if this can be accomplished the trial court should enter a judgment on the verdict. Manders v. Pulice, 44 Ill. 2d 511, 517, 256 N.E.2d 330; Western Springs Park Dist. v. Lawrence, 343 Ill. 302, 175 N.E. 579.

In the case at bar, it is apparent that the jury followed Plaintiff's Instruction No. 10. The verdict clearly shows that the jury intended to find for the defendants and, therefore, the trial court did not err in refusing to set aside the verdict.

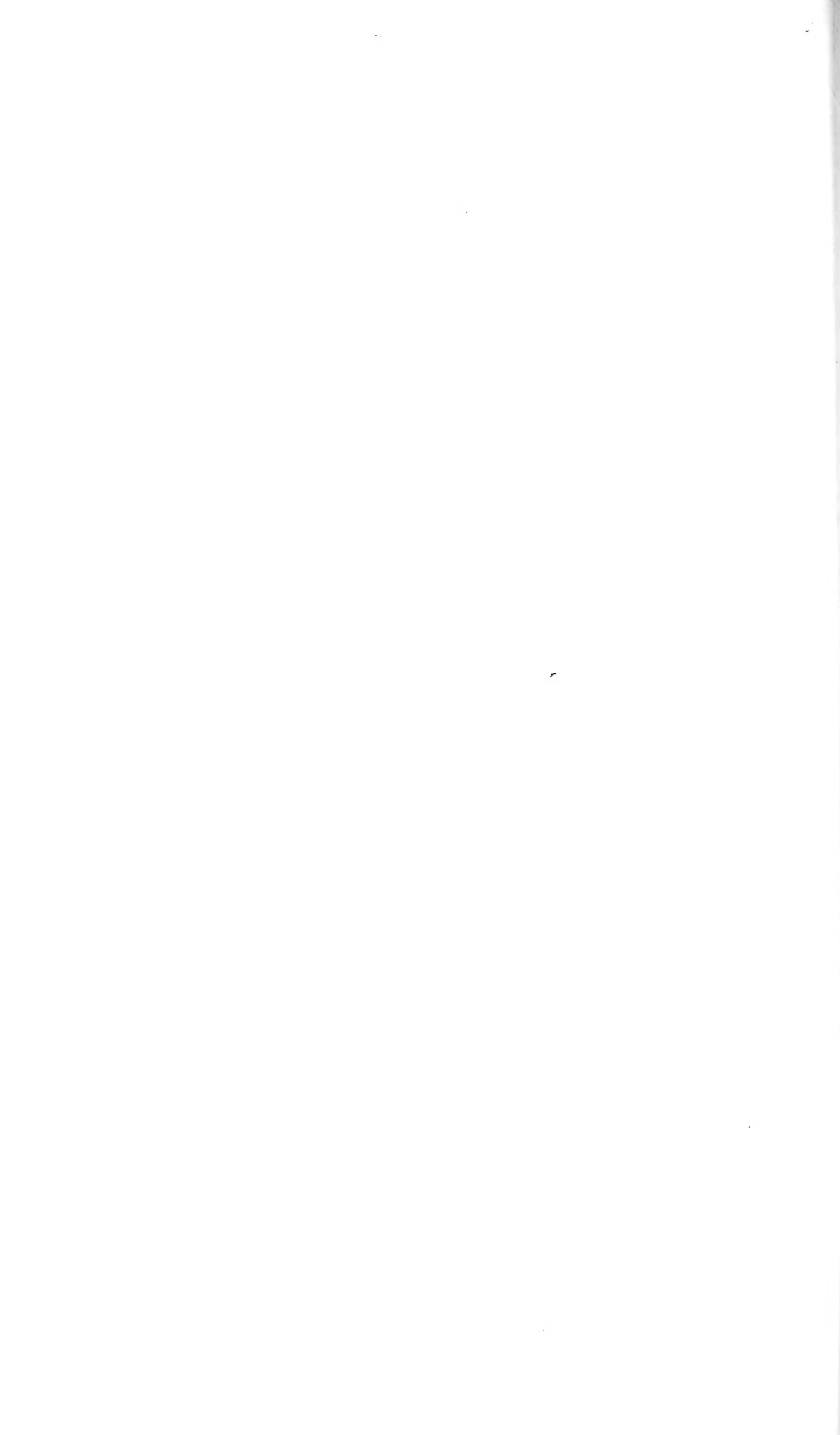
The plaintiff also argues that the verdict of the jury "is totally against the manifest weight of the evidence and should have been set aside". The law is clear that in a negligence

action the plaintiff must establish the duty owed by the defendant, a negligent act, or an omission by the defendant, which breaches that duty, and a compensible injury to the plaintiff resulting from such breach. To warrant an assessment of liability, affirmative and positive proof is required that the actionable negligence was the proximate cause of the injury, and the plaintiff cannot recover unless the jury believes the plaintiff's injury was the result of the defendant's negligence. Jeffrey v. Chicago Transit Authority, 37 Ill. App. 2d 327, 185 N.E.2d 384; Apato v. Be Mac Transport Co., 7 Ill. App. 3d 1099, 288 N.E.2d 683.

In the case at bar, it is apparent that the motor vehicle Johnnic was driving hit the rear bumper of the station wagon in which Hall was riding as a passenger and, therefore, the trial court was justified in finding the defendants guilty of negligence as a matter of law. However, it is not apparent that Hall was injured or that the plaintiff suffered damages because of the defendants' negligence. Both Taylor, the driver of the station wagon in which Hall was a passenger, and Johnnic, the driver of the tractor, testified that there was no damage to the station wagon; that immediately after the accident Hall did not appear to be injured; that Hall walked to a telephone and called the police; and that it was not until Hall was on his way back to the scene of the accident that he had his hand on his back.

The record shows that Hall had a history of a previous lower back condition dating back to 1965. Dr. Leonard Smith testified that on March 28, 1966, he performed surgery on Hall's back for a herniated intervertebral disc.

The records of Dr. Virginia Brenslahan disclosed that when Hall visited her for the purpose of having physical therapy he told her he was a passenger in an automobile that had stopped to



make a turn into an intersection when the automobile was hit in the rear by a truck; and that from this impact he was thrown to the floor of the car. There is no other evidence in the record that the tractor hit the station wagon with such force that Hall could have been thrown to the floor of the car. On the contrary, the evidence shows that the impact was so slight that there was only a small dent on the bumper of the station wagon; and that Hall was capable of leaving the automobile and walking to a telephone to call the police. Taylor, the driver of the automobile in which Hall was riding, testified that before Hall got out of the automobile and went across the street, Hall did not complain about his back. It was the plaintiff's burden to establish a causal relation between the negligence of the defendants and Hall's injury (Daly v. Bant, 122 Ill. App. 2d 233, 258 N. E. 2d 382.) This the plaintiff has failed to do. The tractor was moving slowly when it bumped the rear bumper of the station wagon. Very little damage was done to the bumper. There was ample evidence for the jury to have concluded that Hall's back condition preceded the accident and was not aggravated by it.

The plaintiff relies upon the case of Holmes v. West Sub. Consol. S.-D. Ad. School, 113 Ill. App. 2d 16, 251 N. E. 2d 287. However, the facts in Holmes are inapposite to the facts in the case at bar. There the uncontroverted evidence showed that the C.T.A. and the defendant's bus collided and that both were damaged; that the bus in which the plaintiff was riding was struck by defendant's bus through the admitted negligence of the defendant; that the impact occurred in the place where the plaintiff was seated; and that immediately after the incident the plaintiff claimed injuries. In the Holmes case there was evidence regarding the extent of plaintiff's injuries and damages and a direct report of symptoms resulting from the injuries

was introduced in evidence. In the case at bar, the verdict of the jury was not against the manifest weight of the evidence.

The judgment of the trial court is affirmed.

Judgment affirmed.

Abstract Only.

58454

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
WILLIAM J. BRINSON,)
)
Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

HONORABLE
MAURICE POMPEY,
PRESIDING.



PER CURIAM (FIRST DIVISION, FIRST DISTRICT): *

William J. Brinson, defendant, appeals his conviction after a bench trial of the offense of unlawful possession of a firearm in violation of section 83-2(a) of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 83-2(a)). He was sentenced to a term of 120 days in the House of Correction.

Defendant wished to appeal and the public defender of Cook County was appointed to represent him. After examining the records, the public defender filed a petition in this court for leave to withdraw as appellate counsel pursuant to the requirements set out in Anders v. California, 386 U.S. 738. A brief in support of the petition has also been filed. The brief states in effect that an appeal in this case would be wholly frivolous and without merit. Copies of the petition and brief were mailed to defendant on September 14, 1973. He was informed that he had until November 26, 1973, to file any additional points he might choose in support of his appeal. He has not responded.

After reviewing the petition and brief of the public defender, as well as the record, in the case at bar, we conclude that the only possible basis for an appeal would be whether the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

At the motion to suppress and at trial, the following evidence was adduced: Louis Claude Baxton testified that on

July 13, 1972, he stopped at the Clark gas station at 502 W. 55th Street, Chicago, Illinois to make a telephone call. He asked the defendant if he could make a telephone call. Defendant came out of the door of the gas station with a shotgun and told him to get out of the filling station. The police were called.

Chicago Police Officer Jovanovich testified that on July 13, 1972, he responded to a call and proceeded to the Clark gas station at 502 W. 55th Street, Chicago, Illinois. As he approached the station, he observed Mr. Baxton standing in the street. Baxton stated that the defendant had threatened him with a shotgun. Officer Jovanovich observed defendant and Robert Lee standing in the doorway of the gas station. Defendant was holding a shotgun. Officer Jovanovich approached the defendant and asked him where he put the weapon. Defendant replied that there was no weapon. Officer Jovanovich went into the back room of the Clark gas station and found the weapon he had seen in defendant's hand leaning up against the wall. The weapon was a .12 gauge shotgun, automatic pump, barrel cut off and stock cut off. Seventeen rounds of ammunition were found inside the Clark gas station. After being advised of his constitutional rights, the defendant was asked who owned the shotgun. Defendant replied that it belonged to the owner of the gas station. Defendant was asked if he pointed the gun at Mr. Baxton and defendant replied that he had. Defendant was asked if he had a State firearm owner's identification card and he replied that he did not.

Robert Anthony Lee testified that on July 13, 1972, he worked with defendant at the Clark gas station at 502 W. 55th Street, Chicago, Illinois. At approximately 11:45 P.M. he observed a car pull into the gas station with four men inside and the driver asked to use the telephone. He was concerned about being held up. Defendant told the men in the car to move along. Defendant then pulled a shotgun and forced the car to move on.

William Brinson, defendant, testified that on July 13, 1972, he was employed at the Clark gas station at 502 W. 55th Street, Chicago, Illinois. He had been working at the station for three to four days. The complainant, with three other people in the car, pulled into the gas station and asked to use the telephone. The complainant kept saying things like "You don't talk to me like that. I'll be back here with my boys. You don't know who I am." Defendant testified that he went into the station, got the shotgun, pointed it at the complainant and told him to move along.

In Illinois, the rule is well established that in a bench trial, the credibility of witnesses is for the trial judge to determine. People v. Wright, 3 Ill.App.3d 262, 278 N.E.2d 175. The decision of the trier of fact as to credibility of witnesses will not be disturbed unless it is based upon evidence which is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt. People v. Catlett, 48 Ill.2d 56, 286 N.E.2d 378; People v. Daugherty, 1 Ill.App.3d 290, 274 N.E.2d 109.

In the case at bar, the testimony of Baxton and Officer Jovanovich established that the defendant possessed the shotgun in question. When arrested, defendant was unable to produce an Illinois State firearm owner's identification card and when asked by Officer Jovanovich if he had one, defendant replied that he did not. Defendant, in his own testimony, admitted that he had possession of the firearm in question. Based upon all of the evidence adduced at trial, the defendant's guilt has been established beyond a reasonable doubt.

After a full, independent examination of all of the proceedings in accordance with the dictates of Anders, we concur in the opinion of the public defender that there are no points arguable on their merits and that an appeal is wholly frivolous.

The public defender's motion for leave to withdraw as counsel is allowed and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED;
JUDGMENT AFFIRMED.

* EGAN, J., took no part.

NO. 57698



PEOPLE OF THE STATE OF ILLINOIS)
EX REL. ROBERT BARBEE,)
)
Petitioner-Appellant,)
)
vs.)
)
JOHN J. TWOMEY, WARDEN, ILLINOIS)
STATE PENITENTIARY, JOLIET,)
ILLINOIS,)
)
Respondent-Appellee.)

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

HONORABLE
JOSEPH A. POWER,
PRESIDING.

PER CURIAM*

Robert Barbee (petitioner) appeals from the dismissal of his Petition for Writ of Habeas Corpus by the circuit court of Cook County.

The Illinois Defender Project was appointed as petitioner's counsel on appeal and has filed a motion in this court for leave to withdraw as appellate counsel, supported by a brief filed pursuant to Anders v. California, 386 U.S. 738; counsel therein states that the appeal is frivolous and without merit. Copies of the motion and the brief were forwarded to petitioner and he was allowed additional time to file any points he desired in support of the appeal; petitioner has not responded.

It appears from the pro se Petition for Writ of Habeas Corpus that petitioner was arrested on January 23, 1967 for the offense of grand theft, and admitted to bail; that he departed the State of Illinois in violation of the terms of his bail and was arrested in the State of Michigan on March 17, 1968 for a crime committed in that State; that a warrant had been issued for his detention by the State of Illinois; that he was incarcerated in various Michigan jails between the dates of March 17 and November 9, 1968; that he was returned to the State of Illinois on November 9, 1968; that he entered pleas of guilty on March 4, 1969 to the charges of grand theft and violation of bail bond; that he was placed on probation for concurrent terms of years; and that he subsequently violated the terms of his

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probation, resulting in a revocation of that probation and the imposition of prison sentences. The Petition alleged that the trial court which accepted his pleas of guilty and which subsequently imposed the prison sentences lacked jurisdiction to entertain the matter because of the expiration of the 120-day statute prior thereto; that the custody by the State of Illinois was therefore illegal; and that the pleas of guilty did not waive that jurisdictional defect. After a brief hearing on the State's motion to dismiss the Petition, at which petitioner's appointed counsel contended that the 120-day statute as to the instant offenses commenced running at the time the detainer warrant was issued by Illinois, the motion was allowed and the Petition was dismissed.

The sole matter raised in appellate counsel's brief filed in support of the motion for leave to withdraw, which matter counsel states is without merit, is whether the trial court lacked jurisdiction over the petitioner due to the alleged expiration of the 120-day statute.

The instant circumstances will not support relief under the habeas corpus statute. Habeas corpus is available only where the original trial court lacked jurisdiction to entertain the matter or where something has occurred subsequent thereto which entitles the prisoner to his release. (People ex rel. Shelley v. Frye, 42 Ill. 2d 263, 246 N.E. 2d 251; Ill. Rev. Stat. 1971, ch. 65, par. 22.) The jurisdiction of a trial court over the person of the accused and over the subject matter is not impaired by the running of the 120-day statute. (People v. Prichett, 29 Ill. 2d 407, 194 N.E. 2d 352.) This point is without merit and would not support an appeal in this case.

Upon independent review of the record in the instant case in discharge of our responsibilities under the Anders decision, we have found no additional ground upon which an appeal could be based. Further, the instant pro se Petition for Writ of Habeas Corpus cannot here effectively be treated

as a petition for relief under the post-conviction statute (pursuant to People ex rel. Palmer v. Twomey, 53 Ill. 2d 479, 292 N.E. 2d 379) since petitioner entered pleas of guilty to the offenses charged, thereby waiving the question of whether he had been brought to trial within the terms of 120-day statute and the question of whether he had been afforded a speedy trial. (Ill. Rev. Stat. 1971, ch. 38, pars. 103-5, 122-1 et seq.; People v. Burt, 5 Ill. App. 3d 333, 282 N.E. 2d 221.) While this waiver doctrine must yield where considerations of fundamental fairness so require, we think that no such considerations are present in this case for the following reasons: (1) defendant was "in custody for this State" for 115 days prior to his trial; therefore, there was no violation of his statutory four-term right; (2) People v. Brvarly (1961), 23 Ill. 2d 313, 178 N.E. 2d 326, holds that unreasonable delay by the State in moving to obtain custody of a defendant after his whereabouts (namely, incarcerated in another State) have become known to the State may violate defendant's constitutional right to a speedy trial; but there was no such unreasonable delay in this case. See People v. Terlikowski (1967), 83 Ill. App. 2d 307, 227 N.E. 2d 521. The instant Petition for Writ of Habeas Corpus neither raises matters cognizable under the post-conviction statute, nor does it allege matters which would entitle petitioner to relief upon a hearing of evidence.

The appeal is frivolous and wholly without merit. The motion of the Illinois Defender Project for leave to withdraw as appellate counsel is accordingly allowed and the judgment of the circuit court of Cook County is affirmed.

Motion allowed.
Judgment affirmed.

*Second Division; Stamos, P.J. did not participate.

Publish abstract only.

57457



16 I.A. 569

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
DAVID JACKSON,	)	JOHN J. CROWLEY,
Defendant-Appellant.	)	JUDGE PRESIDING.

PER CURIAM:

David Jackson (hereinafter "defendant") was found guilty at a bench trial of the offense of battery in violation of section 12-3 of the Criminal Code and was placed on probation for a period of one year, on condition that he serve thirty days in the House of Correction (Ill. Rev. Stat. 1971, ch. 38, par. 12-3). He appealed.

The public defender of Cook County, appointed as counsel for defendant on appeal, has filed in this court a motion for leave to withdraw as appellate counsel supported by a brief pursuant to Anders v. California, 385 U.S. 738, in which counsel states that the sole issues which may be raised on appeal relate to the questions of reasonable doubt and of the arresting officer's testimony concerning the complaining witness' photographic identification of the defendant; counsel concludes that those issues are without merit and that the appeal is therefore frivolous. Defendant was forwarded copies of appellate counsel's motion and brief and was allowed additional time in which to file any points he desired in support of the appeal; he has not responded.

The complaint filed against defendant charged him with the offense of battery in that he intentionally and without legal justification made physical contact of an insulting nature with Barbara Hoffman. Defendant waived a trial by jury and orally made a motion to quash the identification.

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Barbara Hoffman testified that as she and a girlfriend were proceeding along the street at about noon on August 19, 1971, defendant approached in an automobile and attempted to "pick them up." The girls refused the offer and continued walking, whereupon the defendant drove up to Miss Hoffman, "grabbed her busts," and drove off. The license number of the vehicle defendant was driving was noted by the girls, the police were notified and Miss Hoffman identified the defendant from a book of police photographs sometime later. Miss Hoffman testified that she had not known the defendant prior to the incident and that the conversation which the girls had with him lasted less than five minutes.

Police Officer Leonard testified that he obtained defendant's identification through the license number of the vehicle defendant was driving, that the complaining witness identified the defendant from a book of police photographs which the officer showed to her and that he placed the defendant under arrest.

The State rested its case; the defendant moved for a "directed verdict"; and the motions for the directed verdict and for suppression of the identification testimony were denied.

Defendant testified in his own behalf and denied having seen the complaining witness on the day in question, stated that he was at work on that day, and testified that the automobile which he normally drove was in the automobile repair shop during the entire month of August, 1971.

We are in agreement with appellate counsel's position that the questions of reasonable doubt and of the arresting officer's testimony that the complaining witness identified the defendant from police photographs are not of sufficient merit to support an appeal in this case. Miss Hoffman's account of the incident was positive and the trier of fact

obviously found it to have been convincing; defendant was further implicated in the incident by his vehicle license number, and his photograph was identified by Miss Hoffman. The credibility of witnesses is for the trier of fact, and the testimony of a single witness, where positive and the witness credible, is sufficient to sustain a conviction. People v. Washington, 121 Ill. App. 2d 174, 257 N.E.2d 190; People v. Brown, 86 Ill. App. 2d 163, 229 N.E.2d 922.

The officer's testimony that Miss Hoffman identified the defendant from police photographs was hearsay and would ordinarily have been inadmissible as evidence (People v. Harrison, 25 Ill. 2d 407, 414, 185 N.E.2d 244); however, no objection was raised to this testimony at trial and the matter is waived for purposes of appeal (People v. Adams, 41 Ill. 2d 98, 242 N.E.2d 167). Further, the evidence elicited from the officer in this regard was merely cumulative of that elicited from the complaining witness.

Upon independent review of the record in discharge of our obligation under the Anders decision, we have noted two additional grounds which may be advanced on appeal but which, in final analysis, will not support a fully developed appeal in this case.

First, it does not appear that any delineation was made between the evidence taken at the hearing on the motion to suppress and that, if any, taken upon the trial of the cause, nor that there was any agreement that the evidence taken in the former proceeding could be considered by the trier of fact as evidence in the latter proceeding. This question is, however, obviated by defendant's motion for a "directed verdict" upon the close of the police officer's testimony; by defendant's taking the stand in defense of the substantive charge; by his adducing evidence in mitigation of the offense; and by his failure to object to the rather informal

procedures employed by the court and counsel. This matter has been waived.

Finally, the new Unified Code of Corrections is applicable to the instant case, since the direct appeal is here pending (People v. Harvey, 53 Ill. 2d 585, 294 N.E.2d 269). The sentence imposed upon defendant in the instant case, that of one year's probation, carried with it the condition that he serve thirty days in the House of Correction. Subsection (d) of section 1005-6-3 of the new Code specifically provides that service of a period of imprisonment shall not be imposed as a condition of a sentence of probation, but the new Code does provide for other forms of conditions which may be imposed under the proper circumstances (see Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-6-3). The circumstances here show that the instant probation was imposed in January, 1972, over 18 months ago, for a one year period on condition that thirty days be spent imprisoned. Therefore, that portion of the sentence imposing the thirty-days incarceration as a condition of the probation will be vacated.

For these reasons, we conclude that the appeal is frivolous and wholly without merit. The motion of the public defender of Cook County for leave to withdraw as appellate counsel is accordingly allowed; the condition of the sentence that defendant serve thirty days in the House of Correction is vacated; and the judgment of the circuit court of Cook County, as modified, is affirmed.

Motion allowed;
Judgment affirmed as modified.

SECOND DIVISION.

HAYES, J., did not participate.

(Abstract only.)

FILED

JAN 21 1974

No. 72-123

16

LARRY L. SEITZ, Clerk pro tem
Appellate Court, Second District

IN THE
- APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
WILLIAM A. RIGGS,)
)
Defendant-Appellant.)

161.A.^{3D} 337

Appeal from the Circuit
Court of the Eighteenth
Judicial Circuit, Du-
Page County, Illinois

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant was convicted, in a bench trial, of the offense of Driving While License Suspended (Ill.Rev.Stat. 1971, ch. 95½, sec. 6-303). He appeals from his conviction and resulting sentence to 30 days in the County Jail, plus a \$125 fine.

Defendant was first stopped in his car on Lake Drive in Willowbrook on August 5th, 1971. The officer testified that defendant told him that he did not have his license with him and did not know whether it was in his wallet which was at his office or in an apartment adjacent to where the vehicle had been stopped. Defendant went into the building and returned, stating that he could not find his license. The officer then advised defendant he would issue a citation for having no driver's license on his person and, in addition, one for a failure to transfer registration of license plates. Later, on the same day, after having received a reply to his inquiry to the Secretary of State that defendant was on suspension, the officer again observed defendant driving his

car and arrested him for the offense of driving with a license suspended. The traffic complaints which were consolidated for trial in each instance recited defendant's address as "1555 N. Dearborn Parkway, Chicago".

The defendant testified that on March 1st, 1971 (some six weeks prior to the notice of suspension placed in evidence and dated April 16th, 1971) he had sent a letter to the Secretary of State notifying him that he was changing his address from Chicago to 5715 W. Grand Avenue in Western Springs in the care of a business associate, since he was leaving town for a time. He offered a document which was admitted in evidence and purported to be a copy of the typed letter sent to the Secretary of State by the defendant. The copy contained no signature of the defendant but included a signature of a notary and his seal. On cross-examination, defendant testified that when he was arrested for the first time in the afternoon he told the officer that he lived on Frontage Road in Clarendon Hills and that he had not given him the Chicago address. Later, on cross-examination defendant answered that while his address at the time of the arrest was on Frontage Road he did not know whether he gave the officer that specific address, but that he was "almost positive" that he did not give the officer the North Dearborn Parkway address.

Defendant further testified that he had gone to a Mr. Farry's office where he had the original letter typed, that it was notarized by Mr. Lann in the same office, and that the letter addressed to the Secretary of State was placed in a mail box in the presence of the notary when he walked out with him.

Mr. Lann testified that he notarized documents purporting to be a letter in duplicate addressed to the Secretary of State and that he saw the defendant place an envelope in the mail which he assumed was the same letter.

The record discloses that the notice of suspension was sent by the Secretary of State to the defendant at the 1555 North Dearborn Parkway, Chicago address.

The offense of Driving While License Suspended was proven by the State when it presented evidence that defendant was driving an auto on a public highway at a time when his license was suspended. (People v. Espenscheid (1969), 109 Ill.App.2d 107, 111.) As a defense, the defendant was required to show that the Secretary of State failed to notify him of his suspension as required by statute. (Ill.Rev.Stat. 1971, ch. 95½, sec. 6-209.) The notice of suspension was mailed to the defendant at the address indicated on his driver's record as his last known address. Defendant's purported proof that he sent a letter notifying of a change in address involved a question of credibility, which the court could properly resolve against him in view of the uncertain circumstances in the record to support the defense. Defendant's testimony that at the time of the arrest he was residing at the Clarendon Hills address, but that he could not recall if he gave the officer that address, and did not give the officer the Chicago address written on the complaints, raised further doubts as to the credibility of his testimony. In addition, the purported copy of the letter which defendant relied upon was unsigned even though notarized and the evidence relied upon to corroborate the purported mailing of the letter notifying the change to the Western Springs address was inconclusive. The officer's testimony that defendant initially claimed to have a driver's license in his wallet at his apartment or office and later admitted that he lied to the officer, was further impeachment of the reliability of defendant's testimony. The court was not obliged to believe defendant's denial of the conversation and the court could well have concluded that the defendant was likewise not truthful when he claimed that he notified the Secretary of State.

Defendant's citation of McMullen v. Alger (Mich. 1954), 63 N.W.2d 599, holding that a similar statute requires that notice to suspend a driver's license must be sent to the last known address of the defendant and not to a prior address, does not aid him under the circumstances. The determination by the trial court that the Secretary of State mailed notice to the defendant's last known address according to statute and had not been notified of any other address by defendant is supported by the evidence. The judgment is therefore affirmed.

Affirmed.

GUILD, J. and RECHENMACHER, J. concur.



58065

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
)
)
RONNIE SMITH,)
)
Defendant-Appellant.)

Appeal from the Circuit
Court of Cook County.

Honorable Maurice D. Pompey,
Presiding.

PER CURIAM:

Ronnie Smith was found guilty after a bench trial of the offense of aggravated assault, in violation of section 12-2(a)(1) of the Criminal Code, and was sentenced to a term of eleven months in the county jail. Ill.Rev.Stat., 1971, ch. 38, par. 12-2(a)(1). He contends on this appeal that he was not proven guilty beyond a reasonable doubt, that the trial court committed reversible error in connection with the introduction of certain evidence, and that the waiver of his right to a jury trial was improperly executed.

The complaining witness, Sharon Hall, testified that on January 11, 1972, she was proceeding to her home from school at approximately 9:15 P.M. when she observed a man whom she identified at trial as the defendant at the corner of 103rd Street and Rhodes Avenue in Chicago. The witness "felt" that someone was behind her as she proceeded on the sidewalk, she crossed into the street and walked faster, and she observed the defendant approach an automobile in front of her. As the witness neared that vehicle, the defendant drew a gun and threatened to kill her if she screamed.

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The witness testified that the street was lighted with "normal street lights" and that she observed the defendant's face for some two or three minutes while he was speaking to her, the witness stating that she kept looking at his face and could "remember his complexion and everything." The defendant pulled at her coat and forced her into a nearby unlighted gangway at gunpoint, toward the alley and a garage where he attempted to open the garage but was unable to do so. An automobile approached in the darkened alley with its headlights lighted, the defendant again threatened the complaining witness, and when the witness approached the automobile, the defendant fled. The complaining witness testified that she thereupon notified the police and gave them a description of the assailant. During the examination of this witness, several objections were raised by the defense to questions regarding the identification of the defendant at trial and at a pre-trial lineup, the objections being grounded upon the failure of the police to have advised defendant as to his alleged right to counsel at the lineup. After those objections were overruled, the complaining witness testified that she had identified the defendant in that lineup.

Police Officer Arthur Smith testified for the State that he placed defendant under arrest on January 31, 1972, because the defendant matched the description the officer had of a person wanted in connection with a series of rapes and robberies in the area. The defense raised objections to the officer's testimony relating to the description of the person wanted for those other offenses and also to his testimony relative to the complaining wit-

ness' identification of the defendant at the lineup, the objection being again grounded on the theory that defendant was not advised of his alleged right to counsel at that lineup; the officer testified upon denial of those objections that the complaining witness identified the defendant at a lineup. The defense also requested copies of "all police reports" made in connection with the case; the record reveals that defense counsel was supplied with one report.

Defendant testified in his own behalf and denied seeing the complaining witness on the night in question, denied possessing a gun on that date, and testified as to his height and weight on that date.

Defendant's first contention that the State failed to prove his guilt beyond a reasonable doubt is without merit. That contention is based upon the allegedly poor lighting conditions at the scene of the assault and upon the discrepancy between the defendant's height and weight and those characteristics related by the complaining witness in her description to the police.

The foregoing summary of the evidence demonstrates that the question of the identification of the assailant and the weight to be accorded the testimony of the complaining witness in that regard was for resolution by the trier of fact. It is settled that the testimony of a single witness, where positive and the witness credible, is sufficient to sustain a conviction. Minor discrepancies between the actual physical characteristics of an accused and those contained in the description of an assailant is also for resolution by the trier of fact. The ultimate determination by the trier of

fact will not be disturbed on appeal unless clearly and palpably erroneous. People v. Novotny, 41 Ill.2d 401, 411-412, 244 N.E.2d 182; People v. Ikerd, 26 Ill.2d 573, 188 N.E.2d 12; People v. Williams, 52 Ill.2d 455, 465, 288 N.E.2d 406. The evidence adduced by the State was sufficient to prove the defendant guilty of the offense charged beyond a reasonable doubt.

The case of People v. Reed, 103 Ill.App.2d 342, 243 N.E.2d 628, cited by defendant, involved an identification by the victim of an offense solely by means of a dark coat; it does not appear that the victim there observed the assailant's face during the offense, but that he first observed the defendant's face after the matter was reported to the police and the defendant was stopped several blocks from the scene of the offense.

The second matter raised by defendant involves the introduction of certain evidence, the first of which relates to offenses of which defendant had allegedly been accused other than the instant offense charged.

When the matter was first called for trial before the instant trial judge, he noted that the record showed that the case had been transferred from another judge and that the transfer was due to a change of venue. The assistant State's attorney represented that the first judge disqualified himself because he had "heard other matters regarding the defendant" and defense counsel stated that that explanation was essentially the same account regarding the transfer which he had received from the defendant. The other evidence complained of by defendant in this regard re-

lates to the testimony by the arresting officer, that he placed the defendant under arrest because defendant matched the description of a person wanted in connection with a series of rapes and robberies in the area.

Neither of these matters was brought to the attention of the trial judge for the purpose of affecting the question of the defendant's guilt or innocence of the offense charged. Further, neither matter was objected to at trial for the reason now objected to, and it does not appear that either of the trial counsel or the trial judge considered those matters as having been offered for the purpose which now serves as the ground for the instant objection. This was a bench trial wherein the presumption obtains that the court considered only proper evidence in arriving at its determination, and the instant record does not affirmatively demonstrate that the court considered either of these matters in arriving at that determination. Defendant cannot now predicate error on that ground. People v. Hayes, 3 Ill.App.3d 1027, 1032, 279 N.E.2d 768.

The cases cited by defendant in support of this position are not applicable to the instant circumstances: People v. Gleason, 36 Ill.App.2d 15, 183 N.E.2d 523; People v. Lehman, 5 Ill.2d 337, 125 N.E.2d 506; People v. Tranowski, 20 Ill.2d 11, 169 N.E.2d 347.

Defendant also contends that the trial court committed reversible error in permitting the police officer's testimony that the complaining witness identified the defendant in the pre-trial lineup. The sole objection raised to this testimony at trial related

to the defense theory that defendant had the right to counsel at the lineup and that he was not advised of that right beforehand. Not only was that testimony not objected to on the grounds that it constituted hearsay, but the evidence was merely cumulative of the testimony of the complaining witness that she had identified the defendant at the lineup. Admission of that evidence was not reversible error. People v. Campbell, 113 Ill.App.2d 242, 248, 252 N.E.2d 26.

Defendant further maintains that the trial court committed reversible error in refusing to require the State to tender to the defense, upon the latter's request, all police reports compiled in connection with the case. The record, by implication, shows that more than the single report tendered to the defense was compiled in connection with the case. Even if considered to have been error, the failure to tender the additional reports to defendant was not prejudicial. The request by defense counsel related solely to reports compiled as to defendant's arrest, the legality of which was neither challenged at trial nor on this appeal. It is clear that the instant claimed error did not affect the trial court's finding of guilt, that it was harmless beyond a reasonable doubt and cannot constitute grounds for reversal of the conviction. People v. Helm, 40 Ill.2d 39, 47, 237 N.E.2d 433; People v. Allen, 1 Ill.App.3d 197, 272 N.E.2d 296.

The final point raised by defendant is that the waiver of his right to a jury trial was improperly made, since the public

defender rather than the defendant himself waived the right without any admonitions in open court.

The right to a jury trial may be waived by defense counsel where the waiver takes place in the presence of the defendant; an accused who stands mute while his counsel waives the right to a jury trial is deemed to have acquiesced in that waiver. People v. Sailor, 43 Ill.2d 256, 253 N.E.2d 397. The same rule applies to situations where, as here, the defense counsel is court-appointed and the record discloses that an opportunity was given prior to the waiver for a conference between the defendant and his counsel. People v. McClinton, 4 Ill.App.3d 253, 280 N.E.2d 795. In the instant case, the court passed the matter when initially called for trial to permit appointed counsel time to confer with the defendant. The jury trial was properly waived under these circumstances.

The cases of People v. Boyd, 5 Ill.App.3d 980, 294 N.E.2d 699, and People v. Baker, 126 Ill.App.2d 1, 262 N.E.2d 7, cited by defendant, involve situations where appointed counsel was not allowed time to confer with the defendant prior to the waiver of the jury trial and are therefore, inapplicable to the instant situation.

For these reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division: Justice Mejda did not participate.



58856

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
)	
v.)	_____
)	
JESSE CAMPOS, JR.,	)	HONORABLE
	)	FRED SURIA, JR.,
Defendant-Appellant.	)	Presiding.

PER CURIAM:

Defendant, Jesse Campos, Jr., pleaded guilty on January 30, 1973, to the offense of armed robbery, and was sentenced to a term of not less than four nor more than five years in the Department of Corrections. Ill.Rev.Stat. 1971, ch. 38, par. 18-2. On appeal, the defendant's only contention is that he was denied equal protection of the law because of the provisions of section 2-7 of the Juvenile Court Act [Ill.Rev.Stat. 1971, ch. 37, par. 702-7(1), subsequently amended, effective January 1, 1973], which provided that with certain exceptions not relevant here, "no boy who was under 17 years of age or girl who was under 18 years of age at the time of the alleged offense may be prosecuted under the criminal laws of this State or for violation of an ordinance of any political subdivision thereof."

Defendant's argument is that since a 17-year-old female charged with the same offense would have been eligible for treatment under the Juvenile Court Act, whereas he—a 17-year-old male—was ineligible for treatment under the Juvenile Court Act, he was thereby denied equal protection. This precise contention has been rejected by the Supreme



Court in People v. McCalvin (1973), 55 Ill.2d 161, 302 N.E.2d 342. See also, People v. Daniels (No. 57769, decided November 5, 1973), ____Ill.App.3d____, ____N.E.2d____.

The judgment of the circuit court is therefore affirmed.

Judgment affirmed.

THIRD DIVISION.
Justice McGloon did not participate.



No. 57755

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY
)	
v.)	_____
)	
TYRONE KILGORE and JESSE WILLIAMS,	)	HONORABLE
	)	JOHN J. MORAN
Defendants-Appellants.	)	PRESIDING

PER CURIAM* (First District, Fifth Division):

After a bench trial, defendants and James Thornhill were found guilty of theft in violation of Section 16-1(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1)). Kilgore was sentenced to a term of 90 days in the House of Correction; Williams was sentenced to a term of 150 days in the House of Correction; and Thornhill was sentenced to 60 days in the House of Correction.

On appeal Kilgore and Williams contend (1) an amendment to the complaint as to ownership was ineffective because leave of court was not granted, and (2) they were not proven guilty beyond a reasonable doubt. In addition, Kilgore argues that the complaint charging him with theft contained a substantive defect which could not be cured by the State's proposed amendment. Thornhill is not an appellant.

EVIDENCE

R. Braumn, a Chicago police officer, testified he was in the area of the railroad tracks at about 2100 West Kinzie, Chicago, Illinois and he observed three men, including the two defendants, around a Penn Central Railroad boxcar. He observed one of the men, who was on the car, hand down a vacuum cleaner box to one of the other men standing on the ground. He saw three other boxes on the ground by the boxcar and as he approached, the three men ran. He pointed out Williams to other police officers, who apprehended him a short distance away and the other two men, who ran in another direction, were apprehended by Braumn. During the chase he never lost sight of either Williams or Kilgore.

* Justice English did not participate.

Steve Parson, a special agent for Penn Central Railroad, testified that on December 6, 1971, he received a report and went to the scene where he identified the box containing the vacuum cleaner as being in the custody of Penn Central Railroad following which defense counsel stipulated to that fact.

Jesse Williams testified that on December 6, 1971, he was arrested at Damen Avenue and Hubbard while on his way from his home to a gas station to get some cigarettes. He crossed over the railroad tracks at approximately 2100 West Kinzie. He denied that he was with anyone on that evening and denied entering or being near the railroad car in question.

Tyrone Kilgore testified that on December 6, 1971, he was arrested on Grand Avenue, between Leavitt and Hoyne, and that due to a gunshot wound in 1967 he is unable to do strenuous exercise and cannot run. When arrested he was walking from his home to a restaurant and denied that he had been on the railroad tracks on the evening in question.

James Thornhill testified that he was walking down Grand Avenue when he was placed under arrest on December 6, 1971.

Patricia Heard testified that on December 6, 1971, she was living with Jesse Williams and that she was with him at their residence at 2120 West Washington, when he left to get a pack of cigarettes and did not return.

Chicago police officer Braumn, in rebuttal, testified that on December 6, 1971, he chased Tyrone Kilgore who was running with a limp.

OPINION

Defendants' first contention on appeal is that the amendment of the complaint as to ownership was ineffective since leave of court was not obtained. The complaint initially filed against both defendants alleged that the owner of the stolen property was Steve Parson. Prior to trial the following colloquy occurred:

MR. SIMKIN (assistant State's attorney): Your Honor, prior to any arraignment, the State would ask leave to amend the various complaints. We have to put the proper owner on, which is Penn Central Railroad, and I believe there will be a stipulation as to them being a duly licensed corporation in the State of Illinois.

MR. ROYCE (assistant Public Defender): Yes, we will stipulate that Penn Central is a duly licensed corporation duly licensed to do business in the State of Illinois.

MR. SIMKIN: And we ask that Mr. Parson be resworn. (Complaining witness resworn to complaint)

All the complaints now show Penn Central Railroad as the alleged owner of the various property and Mr. Parson as agent therefor.

THE COURT: Are you ready?

MR. ROYCE: Yes, Judge.

THE COURT: Swear the witnesses.

In People v. Jones, 53 Ill.2d 460, 465, 292 N.E.2d 361, the defendant was convicted of armed robbery. On the morning of trial the assistant State's attorney moved to amend the indictment by substituting the name Delbert R. Mundy for Charles Mundy. The motion was granted over the defendant's objection. Testimony at trial subsequently established that Charles Mundy was the son of Delbert R. Mundy. On appeal, defendant argued that this amendment was error. In rejecting this contention, the court said:

"We believe that this constitutionally required protection has been afforded this defendant and that the particular facts in this case demonstrate the amendment of the victim's first name to be a mere formality. Where, as here, no hint of surprise or prejudice to the defendant is shown, allowance of such an amendment is not error."

In the case at bar, prior to trial the assistant State's attorney moved to amend the complaint by inserting the name of the proper owner. Although the trial judge never ruled expressly upon the proposed amendment, a reading of the entire record leads to the conclusion that the trial court granted the State's motion. Immediately after the State moved to amend the complaint, defense counsel made no objection thereto and then stipulated that Penn

Central Railroad was a duly licensed corporation in the State of Illinois. The complaining witness was then resworn to the amended complaint. The assistant State's attorney then stated that all complaints had been amended and the trial judge ordered the trial to proceed. The trial court's action in allowing the complaining witness to be resworn to the complaint and in ordering the trial to proceed after being informed that the amendments had been completed indicates the trial court granted the State's motion to amend. Defense counsel exhibited no surprise at the amendment and the record shows no prejudice to the defendants. Under these circumstances, we believe the trial court did not err in allowing the State to amend the complaints.

Defendant Kilgore also argues that the trial court erred in allowing the State to amend the complaint charging him with theft. He was initially charged in a complaint which read:

"Steve Parson agent Penn Central complainant, now appears before The Circuit Court of Cook County and in the name and by the authority of the People of the State of Illinois states that Tyrone Kilgore has, on or about 6 Dec 71 at Cook County, Illinois, committed the offense of Theft in that he Jessie Williams of 2120 W Washington obtained unauthorized control over property 1 vacuum cleaner of the value \$150.00 or less the property of Penn Central by Steve Parson of 2100 W Kinzie with the intent to deprive said Penn Central permanently of the use and benefit of said property in violation of Chapter 38 Section 16-1(a)(1) Illinois Revised Statute and against the peace and dignity of the People of the State of Illinois."
(Emphasis ours.)

After the State had rested its case, counsel made a motion to find defendant not guilty. The State at that time moved to strike the words "Jesse Williams of 2120 W Washington" from the complaint, arguing that they were mere surplusage. The motion was granted over defendant's objection and defendant contends that the trial court erred because the words were of substantive nature rendering the complaint legally defective.

In People v. Parr, 130 Ill.App.2d 212, 264 N.E.2d 850, the defendant appealed his conviction for reckless driving, arguing that the complaint filed against him was defective. The complaint alleged to be defective stated that the defendant had knowingly, intentionally and with legal justification committed certain acts. In rejecting defendant's contention, this court said:

"Furthermore, the miswriting of the term 'with' instead of 'without' in relation to 'lawful justification' is also a formal defect, whether the error is considered typographical or a clerical oversight, and did not mislead the defendant as to the nature of the charge against him."

In People v. Ramos, ___ Ill.App.3d ___ (No. 58215 decided September 25, 1973), ___ N.E.2d ___, the defendant was convicted of theft. On appeal the defendant argued that the complaint filed against him was void because it stated that defendant had obtained "authorized" control over certain property. This court rejected the defendant's argument, holding:

"The typographical error in the complaint where the word 'authorized' was used instead of the word 'unauthorized' is a formal defect which does not render the complaint insufficient."

Here, the complaint charged that Kilgore had committed the offense of theft in that he "Jesse Williams of 2120 W Washington" obtained unauthorized control over certain property intending to permanently deprive the owner of the use and benefit of said property. The evidence as adduced at trial showed that Jesse Williams was the co-defendant of Kilgore. The complaint was sufficient to charge Kilgore with the crime of theft and he was in no way misled or prejudiced by the typographical error of inserting the co-defendant's name after the word "he". We believe this to be the type of formal defect amendable under authority of Ill. Rev. Stat. 1970, ch. 38, par. 111-5.

The defendants' final argument is that they were not proven guilty beyond a reasonable doubt because there was no testimony that they in any way obtained unauthorized control over the property

in question. In a bench trial it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt will the finding of the trial court be disturbed. People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385; People v. Poynter, 6 Ill.App.3d 113, 285 N.E.2d 171. We note the testimony of Officer Braumn that at 10:40 P.M. he observed three men taking a box from a Penn Central Railroad car. One man was on the car handing down a box to two men on the ground. Other boxes were already on the ground near those two men. All three men fled as the officer approached but he did not at any time lose sight of Mr. Williams, from the point where he was standing next to the boxcar until he was apprehended by other police officers approximately two hundred feet from the boxcar. Neither did Braumn lose sight of Kilgore before his arrest. There was testimony that the boxes in question were enroute to Sears, Roebuck & Co. and it was stipulated that they were in the custody of Penn Central Railroad.

We note also that each of the defendants testified he was not present at the scene of the alleged offenses, in effect stating that each exercised no control over the boxes in question, either authorized or unauthorized.

The trial judge found that defendants did exercise control over the property of Penn Central Railroad and that it was unauthorized. We believe the record adequately supports that determination.

In view thereof, the judgment is affirmed.

Judgment affirmed.

(Publish abstract only)



57804

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellant,)	
)	
v.)	
)	
CHARLES S. BROWN,	)	HONORABLE
	)	KENNETH E. WILSON,
Defendant-Appellee.	)	PRESIDING.

PER CURIAM* (FIFTH DIVISION, FIRST DISTRICT):

The State appeals the dismissal of an indictment contending that a finding of no probable cause at a preliminary hearing does not bar it from presenting the matter to a grand jury. The defendant neither entered his appearance nor filed a brief in this case.

Defendant was initially arrested and charged by complaint with the murder of Golden Payne. On August 10, 1971, a preliminary hearing was held and the court ruled that probable cause had not been established. Thereafter the same evidence was presented to the Grand Jury which returned an indictment charging the defendant with the murder of Golden Payne, the murder of Frankie Lewis and the armed robbery of Golden Payne. The indictment charged that all of the offenses occurred on May 3, 1971, at 8624 South Throop Street, Chicago, Illinois.

Defendant's motion to dismiss and the trial court's order of dismissal were predicated upon two grounds. First, that a finding of no probable cause at a preliminary hearing bars further prosecution; and second, that since additional offenses were included in the indictment which were not charged in the complaint but upon which evidence was heard at the preliminary hearing, those counts should be dismissed under Section 3-3 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 3-3) for failure to prosecute them originally.

* Justice English did not participate.

Defendant's claim that the finding of no probable cause bars any subsequent indictment by the Grand Jury is based upon the second paragraph of Section 7 of Article 1 of the 1970 Constitution of Illinois which provides:

"No person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary unless either the initial charge has been brought by indictment of a grand jury or first has been given a prompt preliminary hearing to establish probable cause."

However, this argument has been expressly rejected by the Supreme Court. In People v. Kent, 54 Ill. 2d 161, 295 N.E.2d 710, the defendant was initially arrested and charged with armed robbery. At a preliminary hearing the trial judge ruled that probable cause had not been established. Subsequently an indictment was returned against the defendant charging the same armed robbery that had been the subject of the preliminary hearing. Defendant's motion to dismiss was granted and the State appealed. In reversing the trial court's action the Supreme Court said:

"In our opinion the language of the constitutional provision, as well as the history of its evolution, negates any thought that its purpose was to attach finality to a finding of no probable cause, or to establish mutually exclusive procedures so that grand jury proceedings would be barred if an accused had been discharged upon preliminary hearing.

* * *

"We know of no Illinois authority, however, which holds that an order releasing an accused for want of probable cause is appealable, or that it is in any way conclusive upon the prosecution."

Defendant's second argument is that the State was barred from adding charges to the indictment which were not presented at the preliminary hearing. Defendant bases this argument upon Section 3-3 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 3-3.) That section provides:

"§3-3. Multiple Prosecutions for Same Act.] (a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.

(b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), if they are based on the same act.

(c) When 2 or more offenses are charged as required by Subsection (b), the court in the interest of justice may order that one or more of such charges shall be tried separately."

Under Section 3-4 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 3-4) a subsequent prosecution for an offense arising out of the same act is barred only where the former prosecution for the first offense resulted in a conviction or an acquittal or is otherwise barred by the terms of that section. The sole purpose of a preliminary hearing is to ascertain whether the crime charged has been committed and, if so, whether there is probable cause to believe that the defendant committed the offense.

People v. Adams, 46 Ill. 2d 200, 263 N.E.2d 490; People v. Morris, 30 Ill. 2d 406, 197 N.E.2d 433. Under the 1970 Illinois Constitution a finding of no probable cause at a preliminary hearing is not conclusive upon the prosecution and does not bar subsequent indictment by the Grand Jury. People v. Kent, 54 Ill. 2d 161, 295 N.E.2d 710. A finding of no probable cause at a preliminary hearing is not a conviction or an acquittal nor is it otherwise within the terms of Section 3-4 of the Criminal Code. People v. Neal, 89 Ill. App. 2d 318, 231 N.E.2d 610. In the case at bar the finding of no probable cause at the preliminary hearing did not foreclose the possibility of adding additional charges based upon the same facts in the subsequent indictment returned by the Grand Jury.

For the foregoing reasons the judgment of the circuit court is reversed.

REVERSED.

ABSTRACT ONLY.



No. 58702

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY
)	
v.)	
)	
JOHN C. TERRY,	)	HONORABLE
	)	ROBERT A. MEIER
Defendant-Appellant.)	)	PRESIDING

PER CURIAM* (First District, Fifth Division):

After a bench trial, defendant was found guilty of the rape of Jeanette Christian and the armed robbery of Rufus Martin and sentenced to a term of four years to four years and one day on each charge, the sentences to run concurrently. On appeal, he contends that he was not proven guilty beyond a reasonable doubt.

EVIDENCE

Jeanette Christian testified for the State that on August 7, 1971, at approximately 11:15 P.M., she was on her way home walking down an alley with Rufus Martin and two other friends when defendant, who was with a young man later identified as Hughes, pointed a pistol and ordered them to stand with their faces to the wall. Defendant took \$18 from Miss Christian's bra and, while Hughes held the gun, defendant threw Miss Christian to the ground and forced her to have intercourse with him. Defendant then held the gun while Hughes forced her to have intercourse with him. Miss Christian then heard three shots and both men ran. The police were called and when Officer Asbury arrived she gave a description of the offenders describing one man as approximately five feet tall, 16 years of age and wearing red pants, and the second as six feet tall, about 21 years old, with a straw hat and brown clothing. The area was lighted from a street light and another light in the alley. Prior to the incident, she had consumed a small bottle of wine.

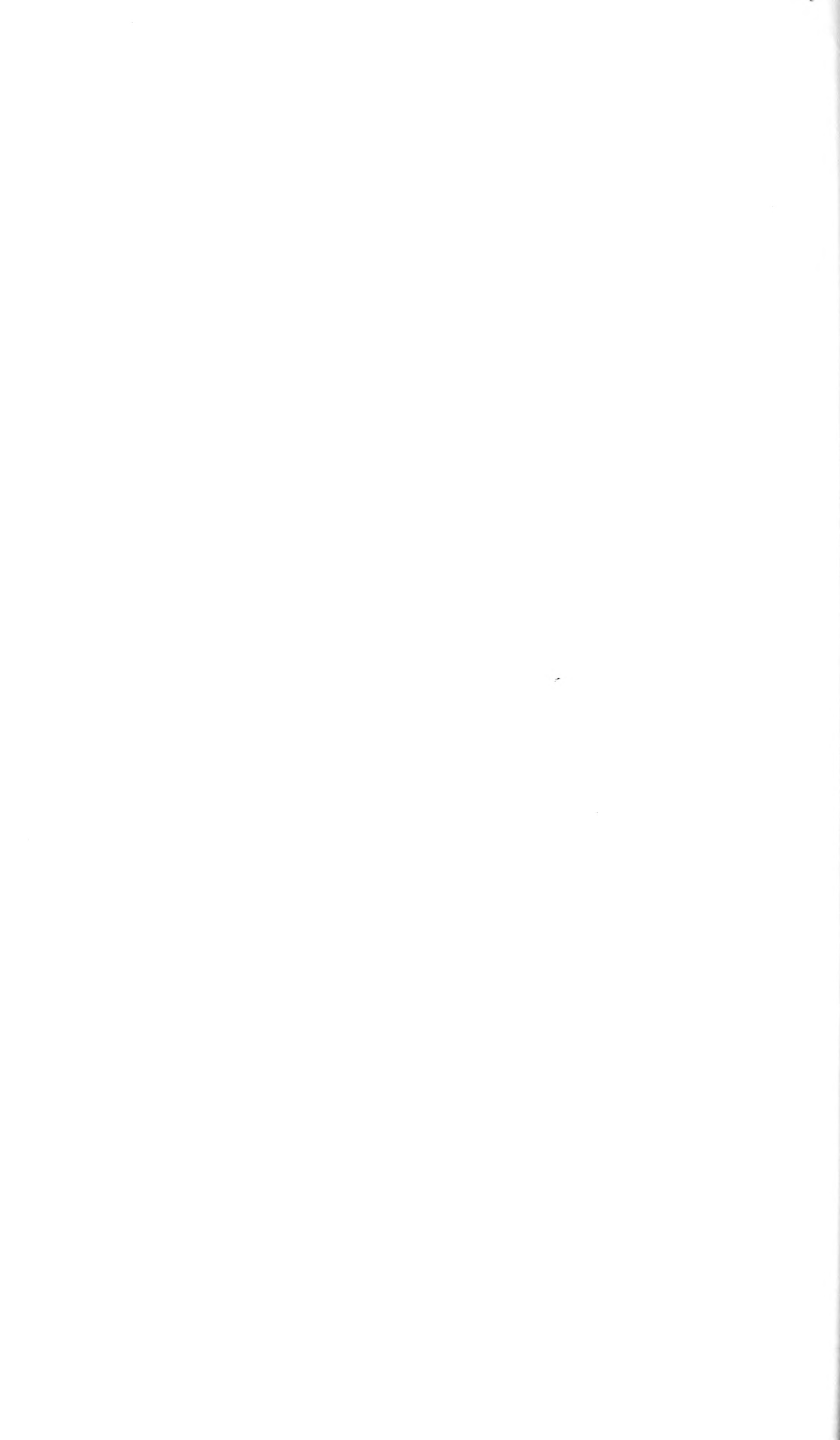
The next day she and Rufus Martin were sitting across the

* Judge English did not participate.

street from Malcolm X College where she observed defendant with Hughes and several other men. At that time, defendant said, "There is the bitch we fucked last night." She and Martin followed defendant to a housing project where she informed the security guard of what had occurred. The Chicago Police were called and defendant was placed under arrest. She testified also that she had clawed the eye of one of her molesters and when she saw defendant the next day he had a patch on his eye.

Rufus Martin testified for the State that he is the common-law husband of Jeanette Christian. On August 7, 1971, he was returning home with her and other friends when two men stopped them in the alley. The men took \$40 from his pocket. One of the men was defendant and he held a gun. After taking his money, defendant then threw Miss Christian to the ground and had intercourse with her. When Martin ran for help defendant fired three shots at him. Prior to the incident in question, he had consumed about a half pint each of bourbon and scotch. The following day, he was with Miss Christian outside Malcolm X College when he heard defendant say, "There is the bitch we fucked last night." He and Miss Christian followed defendant to a Chicago Housing Authority building where the security police there arrested him and Hughes.

Terry C. Asbury, a Chicago police officer, testified for the State that on August 7, 1971, at approximately 11:30 P.M., he responded to a call and proceeded to the alley at approximately 1812 West Jackson, where he saw Jeanette Christian who told him that she had been raped. She was taken to Cook County Hospital and, in his opinion, she was not under the influence of alcohol. She gave him a description of the two offenders describing one as a male Negro, 16 years old, five feet four inches, wearing a red hat and the other as a male Negro, 21



years of age, six feet tall, 180 pounds, straw hat and dark pants.

Arthur Foster and Eugene Williams, Chicago police officers, testified for the State that on August 7, 1971, at approximately 11:30 P.M. in the 1800 block of West Jackson Boulevard, they observed Rufus Martin who ran out into the street, stopped the squad car and stated that he had been robbed.

Frank Tribett, a security officer for the Chicago Housing Authority, testified as a witness for defendant, that on August 8, 1971, Jeanette Christian and Rufus Martin informed him that the two men who had raped Jeanette and robbed them the prior evening were at 1810 Adams, Chicago, Illinois. They pointed out defendant and Tyrone Hughes and he placed both men under arrest. They were unarmed and did not resist arrest. Miss Christian was then taken to his office where she stated that defendant was not the man who had raped her. She told him that she had changed her story because defendant threatened her. After he told her she had nothing to be worried about she then stated several times that she was sure defendant and Hughes were the men who had robbed and raped her.

Dwight Reynolds, age 18, testified for the defense that on August 8, 1971, he was with Tyrone Hughes, Larry Gates and William Tinsley outside of Malcolm X College. They walked by Jeanette Christian and Rufus Martin, who were sitting outside the college. At that time William Tinsley said he had fucked Jeanette Christian the other night. Reynolds testified defendant was not with them at this time.

Sandra Blakely, age 14, testified for the defense that on August 7, 1971, in the evening hours, she was at her home with her sister, her brother and that defendant arrived at her home at approximately 3:00 P.M. and left at approximately 11:15 P.M.

Mazubia Terry, the defendant's mother, testified for defendant

that on August 7, 1971, the defendant came home between 11:30 and 12:00 midnight.

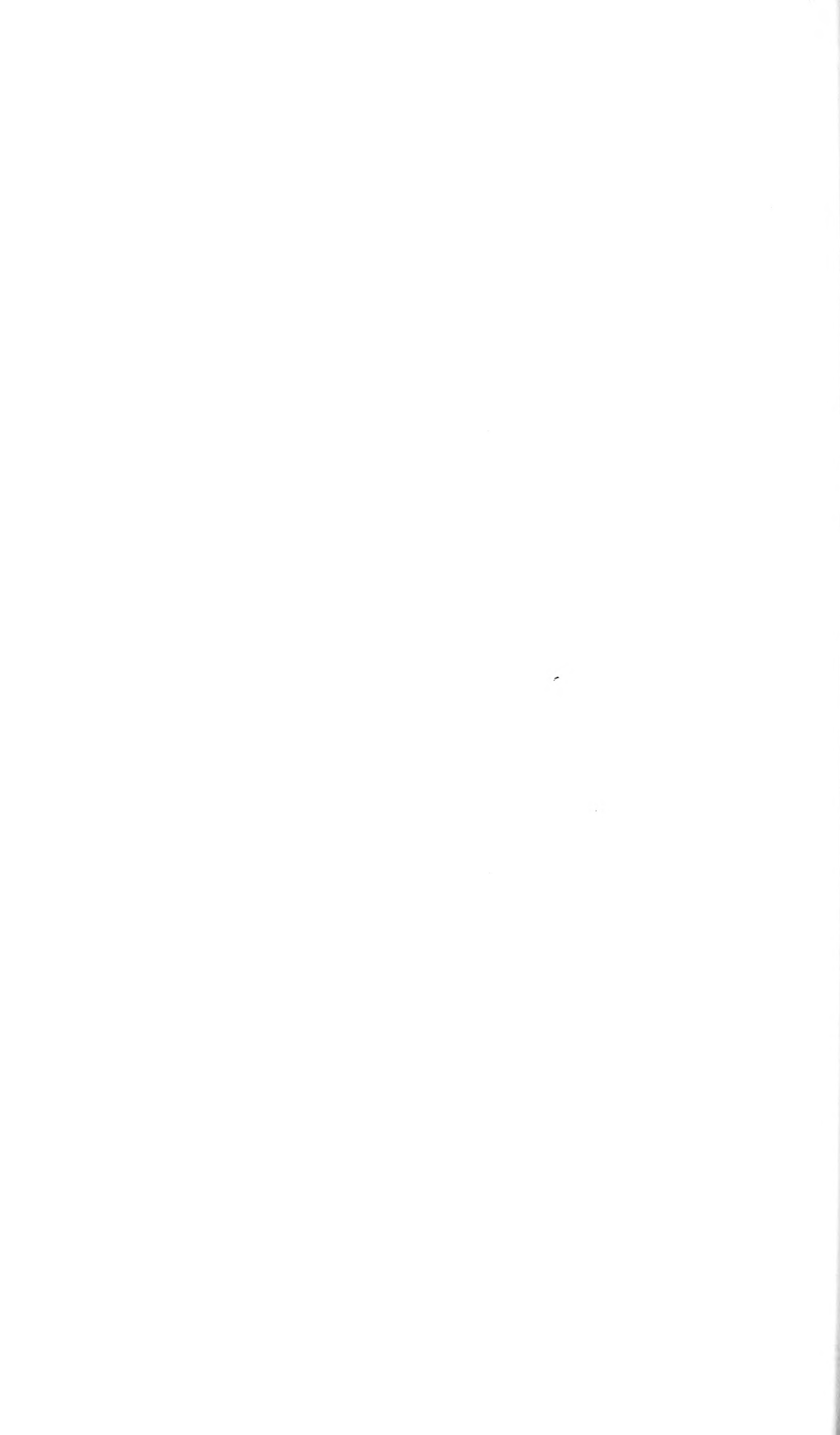
Defendant testified that on August 7, 1971, he was at the Blakely home until after 11:00 P.M. and then returned home, arriving between 11:30 and 12:00 midnight and found that his cousin, Larry, was in his apartment. He spent the night there with Larry and he denied he raped or robbed Jeanette Christian or robbed Rufus Martin.

It was stipulated that defendant is 23 years old.

OPINION

Defendant's only contention on appeal is that he was not proven guilty beyond a reasonable doubt because the testimony of the prosecuting witnesses was conflicting, contrary and self-impeaching. He argues that neither eyewitness had a sufficient opportunity to observe their assailants and points out alleged discrepancies between the testimony of Jeanette Christian at the trial, her testimony at the preliminary hearing and before the Grand Jury. At trial Jeanette Christian testified she was coming home from a liquor store. At the preliminary hearing she testified that she was coming home from a friend's house and then had stopped at a liquor store and was on her way home. At trial she testified that the alley was lit, but at the preliminary hearing that it was dimly lit.

The lighting conditions were described by Miss Christian at trial. She stated that the alley was lit by one light further down the alley and by another light on the street. Further, at trial Miss Christian, in responding to this point, stated, "It wasn't that dimly lit." Defendant also refers to her testimony that she was robbed, but that she informed the first police officer only that she had been raped. We note that, in testifying concerning her statement to the police officer, she said her



immediate response was that she had been raped. We believe it understandable that to her it was more important to report the rape than the robbery when the police first arrived on the scene. Defendant argues also that the testimony of both witnesses is undermined by the amount of liquor each had consumed. We note, however, that no witness testified that either of the complaining witnesses was under the influence of intoxicating liquor.

Defendant argues other alleged contradictions; however, after a careful review, we believe them to be only minor discrepancies.

The rule is well established that the uncorroborated identification of a defendant by a single witness is sufficient to convict if the testimony is positive and the witness credible, even though contradicted by the defendant. People v. McVet, 7 Ill. App. 3d 381, 287 N.E.2d 479. Minor discrepancies and inconsistencies do not destroy the credibility of eyewitnesses' identifications, but affect only the weight to be given such testimony. People v. Strother, 53 Ill. 2d 95, 290 N.E.2d 201. The sufficiency of the identification of an accused is a question for the trier of fact, and courts of review will not reverse that decision unless the evidence is so unsatisfactory as to leave a reasonable doubt as to defendant's guilt. People v. Catlett, 48 Ill. 2d 56, 268 N.E.2d 378; People v. Jackson, 28 Ill. 2d 566, 192 N.E.2d 873. Here, two eyewitnesses positively identified defendant. Both witnesses testified that they observed defendant from close proximity for varying periods of time and both described the lighting conditions to be adequate. In addition, both identified defendant the following day with a group of other men and they immediately called the police.

It was for the trier of fact to make the initial determination as to whether or not the witnesses had a sufficient period

of time under adequate lighting to observe defendant so as to fix his identity. Here, the trial judge determined that the two witnesses did have a sufficient period of time under adequate lighting to identify defendant and, from our review, we cannot say that this determination was erroneous. People v. Gaiter, 8 Ill. App. 3d 784, 291 N.E.2d 172; People v. Wright, 10 Ill. App. 3d 1035, 295 N.E.2d 510.

Defendant also argues that his alibi testimony should not have been disregarded by the trial judge. There is no obligation on the trial court to believe the alibi testimony of a defendant over the positive identification of an accused. People v. Jackson, 54 Ill. 2d 143, 295 N.E.2d 462. The trial judge is in a far better position to observe the demeanor of witnesses during the trial than is the reviewing court. Here, the trial judge found that defendant was the perpetrator of the crime and we believe the record adequately supports that finding.

In view thereof, the judgment is affirmed.

JUDGMENT AFFIRMED.

(Publish abstract only.)

16 I.A. 31694



No. 59000

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
))	CIRCUIT COURT OF
Plaintiff-Appellee,)	COOK COUNTY
))	
v.)	
))	
FREDDIE MC COWNS,)	HONORABLE
))	ERWIN COHEN,
Defendant-Appellant.)	PRESIDING.

*
PER CURIAM (Fifth Division, First District):

After a bench trial, defendant was found guilty of theft and sentenced to probation for one year. Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1).

The public defender of Cook County was appointed counsel on appeal and has filed in this court a motion for leave to withdraw as appellate counsel, supported by a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, alleging that the only possible argument which could be raised on appeal is whether the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt. The motion concludes that the appeal on this issue would be without merit and prosecution thereof wholly frivolous. Defendant was mailed copies of the motion and brief on August 24, 1973 and informed that he had until November 16, 1973 to file any additional points he might choose in support of this appeal. He has not responded.

Arthur Novit, a Chicago Police Officer, testified that he was a member of the mass transit unit working as a decoy on the Congress Street subway platform near Pulaski. On September 14, 1972, at about 10:00 P.M. he was sitting on the ramp to the train platform, dressed in civilian clothes, pretending to be intoxicated when the defendant walked up to him, muttered a few words, searched his clothing and removed his wallet containing United States currency and miscellaneous papers. Defendant then attempted to flee, but was apprehended 10 or 15 feet away. Novit's wallet and papers were recovered from defendant's possession.

Defendant testified that on the date and time in question he was on his way to his barber shop when he observed Novit on the "L"

Mr. JUSTICE ENGLISH did not participate.

platform, that Novit appeared to have blood on his face and when Novit failed to respond to his inquiry as to what happened, he started to walk away but then decided to come back. He reached for Novit's wallet only to determine his identity and that as soon as he touched the wallet, he was immediately placed under arrest. He denied he took the wallet or attempted to flee.

In rebuttal, Novit denied he had any blood or red coloring on his face on the day in question.

In light of the foregoing summary of the evidence, we are in accord with appellate counsel's conclusion that the question of whether the State proved defendant guilty of theft beyond a reasonable doubt cannot support an appeal in this case. The resolution of any conflicts in the evidence, and the weight, to be accorded the testimony of the witnesses is for the trier of fact. The rule is well established that in a bench trial, it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. The testimony of one witness is sufficient to convict if the testimony is positive and the witness credible, even though there may be contradiction by the accused. (People v. Mc Vet, 7 Ill. App. 3d 381, 287 N.E.2d 479.) Only where the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt will the finding of the trial court be disturbed. People v. Hampton, 44 Ill. 2d 41, 253 N.E.2d 385; People v. Pointer, 6 Ill. App. 3d 113, 285 N.E.2d 171.

In the case at bar, the trial court found the testimony of Officer Novit to be positive, credible and sufficient to support defendant's conviction beyond a reasonable doubt. Accordingly, we will not substitute our judgment for that of the trial court.

We have also independently reviewed the instant record in accordance with the dictates of the Anders case and have found no additional grounds upon which an appeal in this case may be based. The appeal is frivolous and without merit.

59000

The motion of the public defender of Cook County for leave to withdraw as appellate counsel is accordingly allowed and the judgment of the circuit court is affirmed.

Motion allowed.
Judgment Affirmed.

ABSTRACT ONLY.

59634)
59635)

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
)	
v.)	
)	
PERCY NERO and LEON REDDICK,	)	HONORABLE ANTHONY J. BOSCO,
	)	Presiding.
Defendants-Appellants.)	

PER CURIAM * (First District, First Division):

Defendants were charged with criminal trespass to a vehicle in violation of Ill.Rev.Stat. 1973, ch. 38, par. 21-2. Following a bench trial, the defendants were convicted as charged. Defendant Reddick was sentenced to serve nine months in the House of Correction. Defendant Nero was sentenced to serve three months in the House of Correction. On appeal, defendants argue that they did not knowingly and understandingly waive their right to a jury trial.

The Office of the Public Defender had been appointed to represent both defendants prior to trial. On August 27, 1973, the case was called for trial and another Assistant Public Defender appeared on behalf of the defendants. He had not spoken with the defendants before that day; but he informed the court that he had briefly spoken with the defendants before the case was called and that he believed "we will be ready for trial today." He requested an opportunity to speak further with the defendants. After inquiring whether a jury was to be impaneled, the trial judge allowed the defense counsel's request to talk with his defendants and to inspect the files by holding the case on call.

The case was recalled later that day. The trial judge asked the Public Defender whether he had had a chance to confer with his clients. He replied that he had. After certain preliminary matters, the trial judge asked the Public Defender (Mr. Mash) whether there were any other pretrial motions. The following then appears on the record:

* Goldberg, J. took no part.

MR. MASH: No, your Honor. At this time both defendants, Mr. Leon Reddick and Mr. Percy Nero are answering ready for trial and waiving jury trial that was previously demanded. They are going to sign jury waivers.

Is that right?

DEFENDANT REDDICK: Yes. We'll go to trial by your Honor.

THE COURT: What is the plea on both charges?

MR. MASH: There's a plea of not guilty on both defendants.

THE COURT: Plea of not guilty; jury waived.

MR. MASH: I'm tendering to the Court an executed jury waiver.

THE COURT: All right. Swear them all in.

In People v. Sailor, 43 Ill.2d 256, 253 N.E.2d 397, the Illinois Supreme Court held that an accused ordinarily speaks through his attorney and that by permitting his attorney in his presence and without objection to waive the right to a jury trial, a defendant is deemed to have acquiesced in and be bound by his counsel's conduct. The Supreme Court stated that a trial court is entitled to rely upon the professional responsibilities of defense counsel and that a defendant will not be permitted to complain of an alleged error which he has invited by his own behavior and that of his counsel. This rule is also applicable to court-appointed counsel. People v. McClinton, 4 Ill.App.3d 253, 255, 280 N.E.2d 795; People v. Suriwka, 2 Ill.App.3d 384, 390, 276 N.E.2d 490, 494; People v. Gav, 4 Ill.App.3d 652, 655, 281 N.E.2d 738, 740.

In People v. Lewis, 13 Ill.App.3d 688, 301 N.E.2d 159, the Appellate Court affirmed defendant's conviction over his contention that he did not knowingly and understandingly waive a jury trial. In that case, the cause was passed after being assigned to the public defender for the purpose of preparation. When this motion was denied after a hearing, the public defender stated in the presence of the defendant that the defendant wished to waive a jury trial and be tried by the court. The Appellate Court was persuaded that on those facts, the defendant waived his right to a jury trial.

In the case at bar, defendants were afforded an opportunity to speak with their court-appointed counsel during a recess. After that recess, the court-appointed public defender moved to dismiss the complaints. When this motion failed, he then answered ready for trial and waived jury trial in the presence of both defendants. One of the defendants spoke up, saying both defendants would go to trial before the judge. Both defendants signed written jury waivers. The record as a whole does not support the claim that the defendants did not knowingly and understandingly waive a jury trial.

The judgment of the circuit court is affirmed. .

JUDGMENT AFFIRMED.

58754



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT,
Plaintiff-Appellee,	)	COOK COUNTY.
)	
v.)	
	)	HONORABLE
GUS A. JONES,	)	SAUL A. EPTON,
	)	PRESIDING.
Defendant-Appellant.)	

Mr. JUSTICE HALLETT delivered the opinion of the court:

The defendant, Gus A. Jones, was indicted for murder, attempt murder, armed robbery and aggravated battery. After a jury trial, he was found not guilty of murder and attempt murder but guilty of armed robbery and aggravated battery and sentenced to concurrent terms of 25 to 50 years and 1 to 5 years in the penitentiary, respectively.

On appeal, he contends: (1) that he was prejudiced by the admission of testimony by a police officer that he had refused to make a written statement after being advised of his rights; and (2) that the sentence imposed is excessive. We disagree on both points and affirm.

Clarence Latimore lived at home with his daughter Alice and one of the co-defendants, Nancy Smith. Around noon on July 25, 1971, he went to a liquor store which he operated. Returning home around 11 P.M., he was admitted by Nancy. According to Latimore, the defendant Gus Jones, who used to work for him, then put a gun to his head, told him this was a "holdup" and ordered him to put his hands up. The defendant took away Latimore's gun, hit him over the head with a gun as a warning and ordered him into the bedroom where Latimore found his daughter Alice tied up. Another defendant, David Byrd, was holding a gun on her. Byrd, Smith and Jones tied him up. Jones then took two rings off Latimore's fingers, Latimore's watch and six or seven hundred dollars. Latimore and his daughter were then placed in the back seat of their car.

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Co-defendants David Byrd and Nancy Smith drove that car following Jones, who was driving another car. During the ride Latimore and his daughter were each shot several times. Alice Latimore died. Mr. Latimore did not. Shortly thereafter, Latimore heard Jones pull up alongside their car and ask what had happened. Jones was told that both were shot and were dead. The car with the Latimores in it was then abandoned and the three defendants left in the car driven by Jones. Latimore summoned help and informed police. Gus Jones was arrested the next afternoon. Police testified that he and Nancy Smith were taken for a ride that afternoon by police to retrace the route taken the night before. According to police, Jones pointed out where several items including Latimore's wallet were thrown by defendant during the ride. Most of these items were subsequently found by the police in the indicated area. Jones refused, however, to sign a statement.

At the trial, the defendant testified that he went to Latimore's home that night with Byrd and met Nancy Smith and Alice Latimore; that as Clarence Latimore drove up, Nancy gave him (the defendant) a gun; that two rings and a watch were taken from Clarence Latimore but that he didn't remember which of them did that; that Latimore and his daughter were tied up and placed in one car and he drove the other; that after the shooting, Nancy threw the pistol she had given him out of the window, along with other items; that Nancy had \$4,000 of her money with her in a paper bag; that Latimore had previously hired him to work in a liquor store; that the next afternoon he was taken by the police on a ride with Nancy but that he did not show them where various items had been thrown out of the car; that he did not put a gun to Clarence Latimore's head; and that he didn't hear anything said about killing the Latimores until after they had been shot. He also denied telling the police that the robbery had been planned by him in advance.



I.

Defendant's first contention, notwithstanding his failure to object at trial, is that he was prejudiced in the eyes of the jury when the trial court admitted testimony by a police officer that he had refused to sign a statement. While we agree that this was error, we conclude that it was not prejudicial in view of the overwhelming evidence of the defendant's guilt. The rule in Illinois is that it is error to admit testimony that the defendant refused to make a statement to police at the time of his arrest, since the defendant has a right to remain silent (U.S. Const. amend. V.; Miranda v. Arizona (1966), 384 U.S. 436) and such testimony is irrelevant to a determination of the defendant's guilt and might prejudice the defendant in the eyes of the jury. (People v. Jones (1972), 4 Ill. App. 3d 888, 282 N.E. 2d 273; People v. McDowell (1972), 4 Ill. App. 3d 382, 280 N.E. 2d 471; People v. Lampson (1970), 129 Ill. App. 2d 72, 262 N.E. 2d 601.) Such error does not, however, require reversal where, as here, there is overwhelming evidence of the defendant's guilt, since under those circumstances such error could not reasonably have affected the outcome of the trial. People v. Novak (1967), 84 Ill. App. 2d 276, 228 N.E. 2d 139.

Here there was eyewitness testimony by the victim positively identifying the defendant, whom he knew well and had formerly employed, as the robber and attacker. We find that evidence of the defendant's guilt was overwhelming in this case. The testimony of a single witness, if positive and credible, is sufficient to convict, even though such testimony is contradicted by the accused. People v. Jones (1972), 4 Ill. App. 3d 888, 282 N.E. 2d 273.

Accordingly, we hold that the error complained of by the defendant was harmless and does not require reversal.

II.

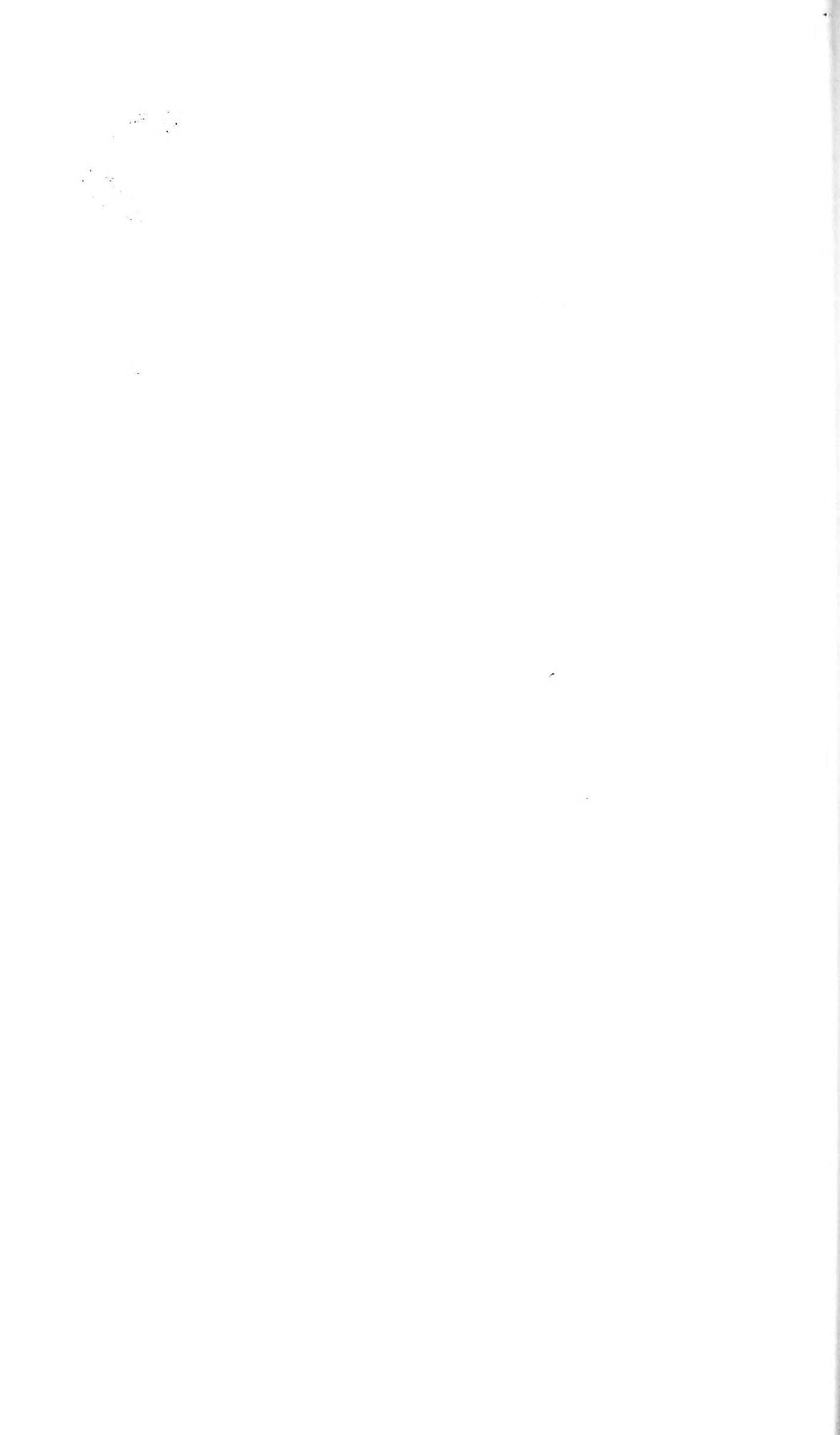
Defendant next contends that the sentence he received was

excessive and that we ought to reduce it in accordance with our authority to do so (Ill. Rev. Stat. 1971, ch. 110A, par 615(b)(4)). The rule in Illinois is that sentencing is a matter within the discretion of the trial court and that the sentence imposed will not be disturbed on review unless there is a patent abuse of discretion (People v. Leone (1972), 7 Ill. App. 3d 392, 287 N.E. 2d 491.) Where, as here, the sentence is within the limits prescribed by the legislature, we will not disturb it unless it represents a clear departure from the spirit and purpose of the law (People v. Taylor (1965), 33 Ill. 2d 417, 211 N.E. 2d 673; People v. Smith (1972), 9 Ill. App. 3d 195, 292 N.E. 2d 128; People v. Brown (1967), 83 Ill. App. 2d 411, 228 N.E. 2d 495) or the penalty is manifestly in excess of the prescriptions of section 11 of the Illinois Constitution which requires that all penalties shall be proportioned according to the nature of the offense and with the objective of restoring the offender to useful citizenship. (People v. Smith (1958), 14 Ill. 2d 95, 150 N.E. 2d 815; People v. Johnson (1973), 13 Ill. App. 3d 204, 300 N.E. 2d 535.) In any case the trial judge, who sees the defendant, is in a better position than we are to appraise him and to evaluate the likelihood of his rehabilitation; consequently, we will not reduce a sentence unless substantial reasons exist for doing so. People v. Kendricks (1972), 4 Ill. App. 3d 1029, 283 N.E. 2d 273.

We see no reason to disturb the trial judge's sentence and affirm.

Judgment affirmed.

BURKE, P.J., and EGAN, J., concur.



161A-31753

No. 58650

HYMAN MARAM,

Plaintiff-Appellee,

v.

OTIS ELEVATOR COMPANY,
a corporation,

Defendant-Appellant.

) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY
)
)
)

) HONORABLE
) WILLIAM B. KANE
) PRESIDING



Mr. JUSTICE SULLIVAN delivered the opinion of the court:

This is an appeal taken by defendant from the trial court's denial of its post-trial motion for judgment consistent with the answer to its special interrogatory submitted to the jury. The action sought damages for injuries, the result of defendant's alleged negligence in failing to properly barricade an escalator undergoing maintenance and in failing to replace the escalator's floor plate after completion of daily work. The jury, after being instructed regarding burden of proof, negligence, proximate cause and contributory negligence, returned a verdict in favor of plaintiff for \$2,250 and also answered the following interrogatory affirmatively:

"At the time and just before the accident of December 7, 1967, was the plaintiff, Hyman Maram, negligent so as to proximately cause, in whole or in part, his own injury."

The trial judge, after stating he had the authority to amend the verdict to conform to the intentions of the jury, declared his desire to poll the jury. Plaintiff then moved that the special interrogatory be declared null and void and, in lieu of polling the jury, that judgment be entered on the general verdict. The court, based upon the inconsistent findings, vacated the jury's finding on the special interrogatory and entered judgment for plaintiff on the general verdict.

OPINION

Although no brief has been filed by plaintiff, we will examine the record to determine whether the defendant is entitled to the

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relief requested. Daley v. Jack's Tivoli Liquor Lounge, 118 Ill. App.2d 264, 254 N.E.2d 814.

Special interrogatories are used for the purpose of testing a general verdict against a jury's conclusion as to the ultimate controlling facts. Freehill v. DeWitt County Service Co., 125 Ill. App.2d 306, 313, 261 N.E.2d 52. Section 65 of the Civil Practice Act (Ill. Rev. Stat. 1971, ch. 110, par. 65) provides in part:

"The jury may be required by the court, and must be required on request of any party, to find specially upon any material question or questions of fact stated to them in writing. Special interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the case of instructions. Submitting or refusing to submit a question of fact to the jury may be reviewed on appeal, as a ruling on a question of law. When the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may render judgment accordingly." (Emphasis added.)

The reason underlying the rule that an answer to a special interrogatory controls an inconsistent general verdict was expressed in First Nat. Bank of Elgin v. Szwankowski, 109 Ill.App.2d 268, 275, 248 N.E.2d 517:

"Part of the rationale supporting the practice of propounding an interrogatory to a jury is that a jury more clearly comprehends a particularized special interrogatory than a composite of all the questions in a case, and therefore, presumably, the jury has more intensively focused its attention upon the question presented."

The statutory inconsistency referred to in section 65 exists only when the special findings are clearly and absolutely irreconcilable with the general verdict. Cohen v. Sager, 2 Ill.App.3d 1018, 1019, 278 N.E.2d 453.

It appears well established that, in the absence of a finding that the answer to the special interrogatory is against the manifest weight of the evidence or has no substantial evidentiary support, the court, when confronted with inconsistencies between the general verdict and the special interrogatory, should enter judgment on the latter. Borries v. Z. Frank, Inc., 37 Ill.2d 263, 226 N.E.2d 16; Kirby v. Swedberg, 117 Ill.App.2d 217, 253 N.E.2d 699. For a verdict

to be held against the manifest weight of the evidence an opposite conclusion must be clearly evident. Walden v. Schillmoeller & Krofl Co., 111 Ill.App.2d 95, 100, 248 N.E.2d 547. Manifest means: clearly evident, clear, plain or undisputable. Elgin Lumber & Supply Co., Inc. v. Malenius, 90 Ill.App.2d 90, 97, 232 N.E.2d 319.

The accident here occurred when plaintiff stepped into a floor plate opening as he tried to walk up an escalator under repair; the floor plate having been removed by the workmen before they left for the day. There was conflicting testimony at trial as to whether barricades were placed around the stopped escalator and whether or not other people had walked up the steps. The record indicates that plaintiff had remained in a position to view the escalator for about 45 minutes and, there being evidence of adequate lighting, it appears there was a substantial question raised as to whether plaintiff exercised ordinary care for his own safety.

We note also that after the return of the special interrogatory, the trial judge concluded that the jury's answer thereto was not against the manifest weight of the evidence and, further, that he believed there was evidence from which the jury could conclude negligence on the part of plaintiff. Our review of the record leads us to the same conclusion. Accordingly, in light of this irreconcilability, the special interrogatory answer controlled the general verdict. Borries, supra; Pendl v. United Parcel Service, 105 Ill.App.2d 167, 245 N.E.2d 77; Todd v. Borowski, 25 Ill.App.2d 367, 166 N.E.2d 296.

We conclude, therefore, the trial court should have entered judgment on the special interrogatory. Scott v. Hernon, 3 Ill.App.3d 172, 278 N.E.2d 259; Chase v. Morgan Cab Co., 2 Ill.App.3d 203, 276 N.E.2d 393.

For the above reasons, the judgment of the trial court is

reversed and the cause remanded with directions to enter judgment for the defendant.

Reversed and
Remanded with directions.

DRUCKER, P.J., and LORENZ, J., concur.

(Publish abstract only.)

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

WILLIAM E. LAMPLEY,)	
)	
Plaintiff-)	
Counterdefendant-)	
Appellee,	)	Appeal from the Circuit Court of
	)	Franklin County.
v.)	
)	
VIRGINIA MITCHELL, et al.,)	
)	
Defendant-)	
Counterplaintiff-)	
Appellant,)	
and)	
	)	Honorable William G. Eovaldi
ASHLAND OIL & REFINING COMPANY,	)	Judge Presiding.
)	
Defendant-)	
Counterdefendant-)	
Appellee.)	

Mr. PRESIDING JUSTICE G. MORAN delivered the opinion of the court:

Following a bench trial in the Circuit Court of Franklin County, judgment was entered in favor of plaintiff oil well driller and operator Lampley in the sum of \$1,258.55 and a lien in that amount was impressed on defendant Mitchell's interest in impounded oil runs held by Ashland Oil Company. Defendant Mitchell appeals.

From 1961 through 1965 Lampley acquired certain oil and gas leasehold interests in West Frankfort, Illinois, from which he sold fractional working interests to Mitchell and others. Mitchell purchased working interests in two leases, both subject to a 1/8th royalty interest; and overriding royalty interests of 1/16th on one lease and 3/32nds on the other. Each purchase was reflected on a "Receipt and Working Agreement" form prepared by Lampley. The agreements provided that the consideration paid included Mitchell's part of the drilling costs of the first well in each respective lease, but that thereafter Mitchell would pay a pro-rata share of the drilling, completion and operating expenses. Wells were drilled and a dispute arose as to certain expenditures. Lampley claimed a lien for the contested

amounts on Mitchells' interest in the oil proceeds. Lampley filed suit to foreclose the lien, resulting in the aforementioned judgment for Lampley and this appeal therefrom.

Defendant Mitchell has assigned 22 issues as error. In our opinion, only one merits extended discussion.

It is undisputed that Lampley sold Mitchell and others fractional working interests subject to stated royalty and overriding royalty interests, and that he subsequently and without authority assigned other persons additional overriding royalty interests on the same leaseholds. This burdened the fractional interest owners with additional overriding royalties and thus reduced their interests. Lampley's action was not authorized by the "Receipt and Working Agreement". The unauthorized overriding royalties were assigned to surface owners for surface damages in order to obtain their consent to drill. Had Lampley paid the surface owners cash he could have properly charged the fractional interest owners their pro-rata share of these costs. He therefore contends that it was proper to assign overriding royalties to surface owners "in lieu of" paying them for damages and pro-rating the costs. This contention is not persuasive.

Lampley agreed to assign stated working interests subject to stated overriding royalty interests, and also to pro-rate certain expenses to the working interest holders. Instead, he increased the overriding royalty interests to which the working interests were subject without authority and without consent of the working interest holders. The trial court upheld this action, stating that he could assign additional overriding royalty interests "in lieu of" paying surface damages. In so holding the trial court erred, because Lampley could not by unilateral action change the terms of the agreement with the working interest holders. Surface damage expenses and overriding royalty interests are not equivalent. The former is usually a flat sum, while the latter is an expense free variable percentage of the working interest.

It will be necessary to recompute the amount of Mitchells' liability because expenses were pro-rated according to erroneous overriding royalty interest figures. This court does not possess the necessary data to compute when Mitchell's

interest is subject to the proper overriding royalty interest. Accordingly, we remand for the trial court to compute Mitchell's liability in accordance with the overriding royalty interests stated in the "Receipt and Working Agreement".

On all other issues we find that the trial court's decisions are correct and not against the manifest weight of the evidence and that further discussion of these issues would serve no value.

We affirm the judgment of the trial court in all respects except the erroneous holding that Lampley could issue additional overriding royalty interests "in lieu of" payments for surface damages, and remand for a recomputation of Mitchell's liability on the basis set forth in this opinion.

Affirmed in part, reversed
in part and remanded.

CONCUR:

Eberspacher and Crebs, JJ.

PUBLISH ABSTRACT ONLY.

No. 72-340

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
JAN 17 1974

Walter T. [Signature]
CLERK APPELLATE COURT

SHELBY D. MATHIS, doing business as SHELBY'S SERVICE,	:	
	:	
Plaintiff-Appellee,	:	Appeal from the Circuit Court of
	:	St. Clair County, Illinois.
	:	
v.	:	
	:	
VILLAGE OF ALORTON, a	:	Honorable Alvin H. Maeys,
municipal corporation,	:	Judge Presiding.
	:	
Defendant-Appellant.	:	

JUSTICE EBERSPACHER delivered the opinion of the court:

This action was brought by the plaintiff, Shelby D. Mathis, against the defendant, Village of Alorton, for monies allegedly due for services rendered and merchandise sold to the defendant. The trial court rendered judgment in favor of the plaintiff against the defendant in the amount of \$3062.80. The defendant has brought this appeal from the judgment entered by the circuit court of St. Clair County.

The plaintiff presented evidence at the time of trial that he had for some period of time prior to 1969, provided gasoline and maintenance for certain vehicles owned and operated by the defendant's police department. He also testified that he had submitted bills from time to time indicating the monthly charges and that these bills would be ruled on by the defendant's Board of Trustees and that he then would be paid. He testified on direct and cross examination that the charges he made to the city were fair and reasonable and that the defendant at the time of the suit owed the plaintiff the sum of \$3068.80 from services and supplies. The plaintiff further testified that neither the defendant's Mayor or Board of Trustees complained about the work performed or the merchandise received by the defendant.

The court received in evidence over the objection of the defendant as

Exhibit 1, a group of invoices and monthly statements dating back to November 11, 1964, and going through May 9, 1969. These invoices indicated what work was done and supplies sold and the amounts due thereon. The defendant objected to the evidence of bills and invoices prior to five years before August 26, 1971 (the date of the filing of this lawsuit) on the grounds that such evidence is barred by the Statute of Limitations.

The evidence indicated that the plaintiff did not have a written contract with the defendant but that his services were obtained by a verbal authorization by the defendant's then Mayor, Arnold Thompson. The services and supplies were consumed or used by the defendant's police vehicles. The services of the plaintiff were terminated in 1969 after a new Mayor had been elected. The termination of the agreement was also done orally. The new Mayor, Curtis Miller, testified as an adverse witness under Section 60 of the Civil Practice Act as part of the plaintiff's case in chief and was then called as a witness for the defendant. His testimony indicated that he was a member of the defendant's Board of Trustees during the period of 1964 through 1969 and that he was elected Mayor in 1969. He also stated that he, while a member of the Board of Trustees, had voted to ratify the payment of bills submitted by the plaintiff.

There was other evidence presented that the defendant did not have the number of automobiles (three) claimed to be serviced by the plaintiff. The plaintiff testified that all work performed by him was done at the direction and instruction of the defendant's then Mayor, Arnold Thompson, upon automobiles that the plaintiff was told by the Mayor were the defendant's vehicles.

At the conclusion of the plaintiff's case and at the conclusion of all the evidence, the defendant made motions for directed verdict which were denied.

The defendant has presented the following issues for our review: (1) Did the trial court err in failing to direct a verdict on behalf of the Defendant at the close of the Plaintiff's evidence and at the close of all the evidence? (2) Was the judgment of the trial court in favor of the plaintiff and against the defendant contrary to the

manifest weight of the evidence? (3) Was the admission into evidence of Exhibit No. 1 (the invoices and monthly statements) error? First, we shall consider the last issue presented by the defendant.

The defendant contends that all charges prior to August 26, 1966 should be barred. The records indicate that the balance due on September 1, 1966 was \$1571.57 of which \$1436.68 was paid. That until December 12, 1967 the balance grew to \$3480.60 on which the defendant paid \$1000 and then charges to August 1, 1968, brought the balance up to \$3667.99 on which \$2000 was paid and then charges to May 9, 1969 brought the balance to the claimed amount of \$3062.80. The total charges from September 1, 1966 to May 9, 1969 totaled \$5928.12 which is some \$2865.32 in excess of the amount claimed to be due. Therefore, even if the court erroneously admitted invoices and monthly statements into evidence which would have been barred by the Statute of Limitations, the error was harmless as there was sufficient evidence to support the dollar amount claimed by the plaintiff. When there is admissible evidence to support the findings of the trial court, this court will assume that this evidence is what formed the basis of the trial court's decision. In re: Estate of D. A. Trautt, 10 Ill.App.3d 944, 295 N.E.2d 293.

Without deciding whether or not the admission of the records was in error, we find that if there was error it was harmless. Nelson v. Union Wire Rope Corp., 31 Ill.2d 69, 199 N.E.2d 769.

Next, we shall consider the question: Was the failure of the court to direct a verdict at the close of the plaintiff's evidence and at the close of all the evidence error and contrary to the laws of the State of Illinois? The defendant's contention is that the performance of work or furnishing of material for a city and the city's acceptance of the resulting benefits will not render it liable to pay if the work has not been authorized. (Roemheld v. City of Chicago, 231 Ill. 467, 83 N.E. 291.) Therefore, the question is whether or not the plaintiff was authorized to do the work. The defendant asserts that there is a dearth of evidence to indicate any authorization for the plaintiff to provide the materials and services. With this we do not agree.

The statements of the defendant's chief witness indicated that he had, while a member of the Board of Trustees, voted to ratify the payment of the bills of the plaintiff. There is also the evidence that considerable sums of money were paid by the defendant to the plaintiff for the services and materials received. Indeed, the defendant's Mayor, Curtis Miller, did not deny that he terminated an arrangement under which the plaintiff had been operating.

The defendant also contends that there is no indication that the services alleged to be rendered were actually rendered to persons authorized to accept the services. The defendant asserts that the case of De Kam v. City of Streator, 316 Ill. 123, 146 N.E. 550 holds that a person dealing with a municipal corporation is charged with notice and is bound at his own peril to ascertain and know the extents and limits of the power and authority of the officer or agent with whom he is dealing. Plaintiff testified that he supplied services to the individuals and vehicles to whom he was instructed by the defendant's Mayor to so supply. There was evidence presented to the contrary by the defendant. The findings by the trial court sitting without a jury shall not be disturbed unless against the manifest weight of the evidence and it is the burden of the defendant to show that such finding is against the manifest weight of the evidence. (In re application of County Collector, 7 Ill.App.3d 124, 287 N.E.2d 81; Foreman & Co. v. Neri, 6 Ill.App.3d 313, 285 N.E.2d 528; Schulenburg v. Signatrol, Inc., 37 Ill.2d 352, 226 N.E.2d 624.) The above cited cases are also appropriate to the defendant's final assertion that the decision is contrary to the manifest weight of the evidence. "On the basis of the record we cannot conclude that the findings of the trier of the fact were against the manifest weight of the evidence." In re application of County Collector, supra.

The judgment is affirmed.

MORAN, PJ and CREBS, J, CONCUR

PUBLISH ABSTRACT ONLY

1974.

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ourt of

On February 5, 1973, plaintiffs retained Bernard A. Paul as their new attorney and filed a motion to re-open. On May 22, 1973, this motion was denied and plaintiffs appeal.

The only issue we decide is whether the trial court properly exercised its discretion in dismissing plaintiffs' complaint and denying plaintiffs' motion to re-open under these circumstances. Supreme Court Rule 219 provides for sanctions to be imposed when a party "unreasonably refuses" to comply with discovery procedures, and those sanctions include dismissal of the offending party's suit. However, it has been stated that "the dismissal of a party's cause of action is drastic punishment and should not be invoked except in those cases where the actions of the party show a deliberate and contumacious disregard of the court's authority." Booth v. Sutton (1968), 100 Ill.App.2d 410 at 415-416, 241 N.E.2d 488; Bergin v. Ashford (1970), 130 Ill.App.2d 835 at 838, 264 N.E.2d 266.

Here plaintiffs were unrepresented during the activities which led to the dismissal of their complaint. Defendant apparently sent them interrogatories, but neither the interrogatories nor proof of service were filed. The record does not show notice of either hearing in January 1973 having been given to plaintiffs or their former attorney. The record indicates the only notice of any of the proceedings involving interrogatories was that notice of the motion of December 12, 1972 to compel answers to interrogatories or dismiss the case for want of prosecution was sent not to the plaintiffs but to their former attorney, who had withdrawn from the case two weeks before. These facts do not demonstrate a persistent failure or unreasonable refusal to comply with discovery rules or any order of the trial court. In light of this record, we feel that some further effort should have been made in accordance with Supreme Court Rule 219 to obtain compliance with discovery procedures before imposing this severe sanction. See Bergin v. Ashford, supra; Gillespie v. Norfolk & Western Railway Co., (1968), 103 Ill.App.2d 449, 243 N.E.2d 27.

Therefore, the order of the trial court is reversed and this cause is remanded to the trial court with directions to set aside the order of dismissal and to enter an order reinstating plaintiffs' complaint.

Reversed and remanded.

CONCUR:

Crebs, Jones, II.

PUBLISH ABSTRACT ONLY.

No. 71-284

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	:	
	:	Appeal from the Circuit Court of
Plaintiff-Appellee,	:	St. Clair County, Illinois.
	:	
v.	:	_____
	:	
MARVIN HAROLD,	:	Honorable James W. Gray,
	:	Judge Presiding.
	:	
Defendant-Appellant.	:	

JUSTICE EBERSPACHER delivered the opinion of the court:

This is an appeal from a burglary conviction in the circuit court of St. Clair County, in which the court revoked probation and on February 5, 1971, sentenced the defendant to serve three to ten years in the penitentiary. Appellant does not dispute the order of revocation but asserts that the sentence imposed was excessive.

The standards to be applied are those contained in the Unified Code of Corrections (Ch. 38, §1001-1-1 et seq., Ill.Rev'd. Stat.). (People v. Chupich, 53 Ill.2d 572, 295 N.E.2d 1; People v. Shadowens, 10 Ill.App.3d 450, 294 N.E.2d 107.) Burglary is a Class 2 felony; the maximum term shall be any term in excess of one year not exceeding 20 years. The Code further provides that "the minimum term shall be one year unless the court, having regard to the nature and circumstances of the offense and the history and character of defendant, sets a higher minimum term, which shall be not greater than one-third of the maximum term set in that case by the court."

At the time defendant was placed on probation he had no previous convictions and the nature and circumstances of the offense were in the judgment of the trial court not such as to require incarceration.

Appellant asserts that the court, after the violation, may have based the sentence on his conduct during the probationary period. The sentence to be imposed



after revocation of probation is to be for the original offense only and not for events occurring while the defendant was on probation. (People v. Lillie, 79 Ill.App.2d 174, 223 N.E.2d 716; People v. White, 93 Ill.App.2d 283, 235 N.E.2d 393; People v. Temple, 13 Ill.App.2d 955, 268 N.E.2d 875; People v. Turner, 129 Ill.App.2d 24, 262 N.E.2d 379.) However, events and possible offenses occurring during the probationary period may properly be considered in determining the rehabilitation potential of the defendant in applying the standards set forth in section 1001-1-2 and section 1005-6-4 of the Uniform Code of Corrections.

Defendant has served in excess of two years of the minimum sentence, and in view of the circumstances and the provisions of the Uniform Code of Corrections, we consider a minimum of two years with a maximum of six years a proper sentence in this cause and modify the sentence accordingly.

We therefore affirm the judgment as modified and remand the cause for issuance of a corrected mittimus in conformance with the modification.

Affirmed as modified, remanded with directions.

MORAN, P.J. and CREBS, J. CONCUR

PUBLISH ABSTRACT ONLY.

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

Appeal from the Circuit Court of
St. Clair County.

SEPH ABERNATHY, JR.,
Defendant-Appellant.

Honorable Robert L. Gagen,
Judge Presiding.

PER CURIAM:

The defendant pled guilty, pursuant to a plea agreement, to the offense of robbery in the Circuit Court of St. Clair County.

The record reveals that the trial court failed to comply with Supreme Court Rule 402(a)(1) which requires the trial court to determine that the defendant understands the nature of the charge against him. Ill.Rev.Stat. ch. 110A, sec. 402(a)(1). In People v. Ingeneri, 7 Ill.App. 809, 288 N.E.2d 550 we held that this provision requires the trial judge to inform the defendant of the essential elements of the crime of which he is charged. The trial court's only attempt in the instant case to comply with Rule 402(a)(1) was the following:

The Court: Do you know the charge that has been placed against you by this indictment?

Defendant: Yes, sir.

The Court: What is it?

Defendant: It's armed robbery is the way the charge reads.
I mean, robbery.

The defendant's answers provided no indication that he understood what elements constituted the crime of robbery, and the court never attempted to inform the defendant.

The judgment is therefore reversed and the cause is remanded to the Circuit Court of St. Clair County with directions that the defendant be permitted to plead anew.

Reversed and remanded.

Berspacher, Jr., not participating.

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
FEB 7 1974

PEOPLE OF THE STATE OF ILLINOIS,)
) Appeal from the Circuit Court of the
Plaintiff-Appellee,) Twentieth Judicial Circuit, St. Clair
) County.
vs.)
)
RAYMOND VINCENT HOMER,) Honorable William P. Fleming,
) Judge Presiding.
Defendant-Appellant.)

PER CURIAM:

Defendant pled guilty to the crime of armed robbery and was sentenced to a term of not less than five nor more than ten years in the Illinois State Penitentiary.

He first contends the indictment was fatally defective because the specific means used to commit the crime were not set out in the indictment. This same contention was made and decided adversely to the defendant in People v. Hayes, 52 Ill.2d 170.

Defendant also contends that the trial court failed to inform him of the nature of the charge as required by Supreme Court Rule 402(a)(1). We find this contention to be correct. The record discloses that the trial court overlooked the explanation of the nature of the charge. This omission requires reversal. People v. Green, 12 Ill. App. 3d 418, 299 N.E.2d 535; People v. Billops (5th Dist., ^{Docket} ~~Agenda~~ No. 72-315) ____ Ill.App.3d ____.

Accordingly, the judgment of the trial court is reversed and this cause is remanded with directions to allow the defendant to plead anew.

Reversed and remanded
with directions.

Crebs, J., not participating.

PUBLISH ABSTRACT ONLY.

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
FEB 7 - 1974
FIFTH DISTRICT
CLERK APPELLATE

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of
	)	St. Clair County.
vs.)	
)	
CARL A. LAMPE,)	
	)	Honorable Harold O. Farmer,
Defendant-Appellant.	)	Judge Presiding.

PER CURIAM:

The defendant pled guilty to the offense of burglary and was sentenced in the Circuit Court of St. Clair County to serve a minimum of one and a maximum of three years in the penitentiary.

The defendant contends that the trial judge failed to comply with Supreme Court Rule 402(a)(1) and (b), Ill.Rev.Stat., 1971, ch. 110A, sec. 402(a)(1), (b).

The record reveals that the trial judge did not determine that the defendant understood the nature of the charge as required by Rule 402(a)(1). The defendant had been given a copy of the indictment at an earlier proceeding and was informed of the name of the charge. As we stated in *People v. Ingeneri*, 7 Ill.App.3d 809, 288 N.E.2d 550, however, the trial court must do more than merely inform the defendant of the charge; the court must also inform the defendant of the essential elements of the crime charged. We also stated in *Ingeneri* that merely furnishing a copy of the indictment to the defendant would not be sufficient because Rule 402(a) specifically requires the trial court to address the defendant personally in open court. In the instant case the trial judge did not read the indictment or the relevant section of the criminal code to the defendant or in any other way attempt to inform the defendant of the essential elements of the crime of burglary.

The trial judge also failed to comply with Rule 402(b) which requires the court to determine whether any force, threats or promises, apart from a plea agreement, were used to obtain the plea. In the instant case the court made no inquiries concerning the use of force, threats or promises.

For the foregoing reasons the judgment of the trial court is reversed and this cause is remanded to the Circuit Court of St. Clair County with directions that the defendant be permitted to plead anew.

Reversed and remanded with directions.

Eberspacher, J., not participating.

PUBLISH ABSTRACT ONLY.

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	Appeal from the Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
)	
vs.)	
)	
TOM MAMON,	)	Honorable Joseph F. Cunningham,
	)	Judge Presiding.
Defendant-Appellant.)	

PER CURIAM:

The defendant pled guilty on December 8, 1972 to the offense of Armed Robbery and was sentenced, pursuant to a plea agreement, to serve a minimum of five and a maximum of fifteen years in the penitentiary.

His sole contention is that the sentence is excessive because of the Unified Code of Corrections which became effective subsequent to his conviction.

The offense of armed robbery is now categorized under the new Code as a Class 1 felony. Ill. Rev. Stat. (1973), Sec. 18-2(b). The code establishes that, for a Class 1 felony, the maximum term shall be any term in excess of four years. In relation to the minimum term to be imposed, the Code further sets out that:

" * * * for a Class 1 felony, the minimum term shall be 4 years unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term; * * * " Ill. Rev. Stat. (1973), Ch. 38. par. 1005-8-1(c)(2).

This court has held that the sentencing provisions of such Code are applicable to reviewing those sentences imposed prior to the enactment of the Code but still on direct appeal after the effective date of the Code. People v. Shadowens, 10 Ill.App.3d 450, 294 N.E.2d 107.

It is apparent from the record that the state recommended and the court imposed a minimum of five years based upon that existing statutory provision that five years was the minimum to be imposed for the offense of armed robbery. The new Code now states unequivocally that the minimum for such offense shall be four years.

For the foregoing reasons the judgment of conviction is affirmed; however, the sentence is modified to provide that the defendant serve a minimum of four years and a maximum of 12 years in the Illinois State Penitentiary.

Judgment affirmed;
sentence modified.

Eberspacher, J., not participating.

PUBLISH ABSTRACT ONLY.

16 I.A.^{3D} 1009

No. 72-146

16

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court for the 15th Judi-
v.	)	cial Circuit, Stephenson
	)	County, Illinois.
JAMES PADFIELD, a/k/a JAMES WAGNER,)	
)	
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant, James Padfield, a/k/a James Wagner, was indicted on two counts of indecent liberties with a child (Ill.Rev. Stat. 1969, ch. 38, pars. 11-4(a)(2), (3), and two counts of contributing to the sexual delinquency of a child (Ill.Rev.Stat. 1969, ch. 38, pars. 11-5(a)(2), (3). He waived a jury trial and was found guilty of only the indecent liberty charges in a trial before the court. He was sentenced to 5 years probation, the first 6 months to be served in the Illinois State Farm at Vandalia. Defendant contends on appeal that he was not proved guilty beyond a reasonable doubt. He also challenges the validity of Count III of the indictment which charged indecent liberties.

Count III as pertinent here alleges that defendant,

" *** committed the offense of indecent liberties with a child, in that he, being a person of the age of 17 years and upwards, did knowingly perform an act of deviate sexual conduct upon Billy John _____, a child under the age of 16 years, in that he did cause Wesley Wayne _____, to place his sex organ in the anus of Billy John _____, Wesley Wayne _____ then being a child *** ."

Defendant argues that the statute defining the offense of indecent liberties with a child (Ill.Rev.Stat. 1969, ch. 38, pars. 11-4(a)(2), 11-2,) requires an act of sexual gratification involving the sex organs of one person and the mouth or anus of another performed or submitted to by the person charged; and that the offense is not properly charged as an act committed in the presence of defendant by another.

We conclude that the indictment was valid. The indictment charged the knowing performance of an act proscribed by the statute. (See People v. Polk (1973), 10 Ill.App.3d 408, 411-413.) The defendant, although charged as a principal, could nevertheless be convicted upon proof that he was the cause of and therefore legally accountable for the conduct of the innocently (see Ill.Rev.Stat. 1969, ch. 38, par. 6-1) participating children. (Ill.Rev.Stat. 1969, ch. 38, par. 5-2; People v. Walker (1935), 361 Ill. 482, 486; People v. Jensen (1945), 392 Ill. 72, 74.) People v. Ball (1970), 126 Ill.App.2d 9, cited by the defendant, is inapposite. In Ball the indictment under which the defendant went to trial omitted any allegation charging the voluntary acts constituting an element of the offense.

Defendant's contention that he was not proved guilty beyond a reasonable doubt is based on his argument that the testimony of the complaining witnesses was inherently unbelievable, inconsistent, falsely motivated, and essentially uncorroborated. He therefore argues that defendant's testimony which denied the acts charged and his proof of alibi were sufficient to raise a reasonable doubt of his guilt.

It appears from the evidence that the defendant lived in a trailer court in Freeport where there were numerous children, including the complainants. Defendant was the operator of a thrill

show called "Jim Wagner's Auto Leap of Death" which involved the use of a large ramp, a brightly colored trailer and a truck. During the summer of 1971 defendant traveled with his show to various parts of the country and would return home occasionally. The defendant would then work on his equipment at the trailer court and children would gather at his home to watch. Two of the alleged victims, Wesley and his brother Billy, often went to defendant's home where defendant would permit them to play his guitar and would give them and other children in the neighborhood posters and stickers dealing with the thrill show.

Billy, age 9 when he testified, related a series of alleged happenings prior to the offense charged. He testified that the first time he was in defendant's trailer alone with him it was "close to winter" in 1970, and that defendant showed him some "nasty books" and rubbed his penis. He said he returned to defendant's house about a time "close to school" and defendant again rubbed his penis and showed him "those books"; and as he was turning the pages defendant committed a perverted act upon him. He stated that "about, maybe a month" before defendant was arrested (defendant was arrested on July 8, 1971), he again went to defendant's home alone and defendant again committed a perverted act upon him and he was told to do the same to defendant, which he did. Defendant told him not to tell his father or mother or any of his brothers. The acts were described with particularity in each instance.

The witness testified that two days later he returned to defendant's home with his brother Wesley and a younger brother Kevin; that defendant told Kevin to leave; that defendant said for Wesley to put his penis in Billy's anus, and Wesley did that. He placed the date as a Wednesday in June, "the 30th I think, after lunch."

The witness also testified that "a couple days later" he and Wesley went to defendant's home with a neighboring child Rhonda; that defendant told he and his brother to walk up and down the street because he was going to make arrangements with Rhonda for a childrens' party which had been promised many times. Billy and Wesley left the trailer and when they returned in about five minutes Rhonda was observed sitting on a chair next to defendant.

Wesley, 11 years old, testified that he had known defendant for about two years; that some time in 1969 he was in defendant's trailer for the first time with his brothers, Billy and Kevin; that defendant was showing them some pictures of his racing and when the witness brought out some other pictures from the cupboard defendant asked Billy and Kevin to leave. He then showed Wesley nude pictures which he said were of defendant's wife. Wesley testified that at a later time, "after Christmas", defendant was also alone with him in the trailer and showed him some books with "people that was nude" in them. He identified People's Exhibits 1, 2, 3 and 4 as the books he was shown.¹ He said that defendant held his penis and he held the defendant's penis.

Wesley further testified that on a "Wednesday in June of 1971, about 12 o'clock noon, he was in defendant's trailer with Billy; that defendant told him to place his penis in Billy's anus, which he did. Wesley also testified on the same day before they left the trailer, Rhonda came in, that he and his brother were asked to leave and that they later returned as Billy had testified. The witness also identified Plaintiff's Exhibits 1, 2, 3 and 4 as the books shown to him by defendant in the trailer.

1 The Exhibits had been seized from defendant's trailer on July 8, 1971 after his arrest. They were entitled "Private Films", "Island Orgy", "268 Loving Couples" and "Playmates".

Rhonda, age 10, testified as the complaining witness named in Count I of the indictment charging indecent liberties, that she lived with her parents in the mobile home park; that she had been in defendant's trailer once the previous year when she and a friend were selling magazines and that another man was with defendant at the time; that she came to defendant's trailer "some time this year", which she described as being during summer vacation in the afternoon on a Wednesday, for the second time; that Billy and Wesley were there; that defendant told Billy and Wesley to run around the block, which they did; that defendant said they were going to have a party; that defendant went to a cupboard and took some books which he showed to her, telling her to turn the pages; and that defendant then placed his hand on her "private parts" over her clothes, asked her if that felt good and when she answered no, that he moved his hand away. She said that when Billy and Wesley returned defendant was writing "stuff down - the party". She then left with Billy and Wesley. She could not identify the books shown to her as Plaintiff's Exhibits but recollected that she was shown a picture of a boy licking a girl's private parts.

Defendant testified that he was the owner and operator of an auto thrill show known as "Jim Wagner's Auto Leap of Death"; that he was a paraplegic from a motorcycle accident some 12 years previous and was unable to walk but able to drive. He stated that on June 30, 1971, the date of the alleged offenses, he left his trailer at 9:00 A.M. to pick up Gale Pittsley, a performer in his show, because they were to perform in Rockford that day. He accounted for his time away from the trailer until he arrived back in Freeport at 2:00 A.M. The following morning defendant and Pittsley left Freeport at 8:00 A.M. and did a series of shows in Wisconsin and Michigan and did not return to Freeport until 8:00 P.M. July 6th.

Defendant also testified to being away from Freeport for various shows in Michigan from 12:15 P.M. on June 24th, 1971, to his return on a Monday, June 28th, 1971. He left for Wisconsin at 9:00 A.M. on June 29th and returned to Freeport at 1:00 A.M. June 30th. Defendant's wife, Gale Pittsley, Doris Love and others essentially corroborated defendant's testimony as to his whereabouts on June 30th, 1971, and prior and subsequent dates.

Defendant denied he had shown the children any of the books or pictures and denied that he had done any of the acts related by the witnesses.

Defendant also testified that on July 7th, the day on which the complaining witnesses went to the police with their story, he took some firecrackers away from Wesley in the street. This was corroborated by other witnesses and was admitted by Wesley. He also testified that in the presence of two men (who corroborated his story on the stand) Rhonda said to him "I am sorry I lied and got you into trouble". Also, that Rhonda told him that Wesley said he would tell the truth if Rhonda would.

Rhonda and Wesley, in rebuttal, admitted they were present at the time but denied having any conversation with the defendant.

Defendant contends first that there is a substantial inconsistency in the testimony of the complaining children in attempting to fix the date of the charged offenses. He argues that the failure to fix the date of the alleged offenses is in itself reversible error. He refers to Billy's testimony that the charged offense involving himself and Wesley occurred approximately one month prior to defendant's arrest, while the incident involving Rhonda occurred two days later. He contrasts that to Wesley's testimony that the offense occurred on Wednesday in June of 1971 and that the offense against Rhonda occurred on the same day; with a further contradiction that Kevin did not go to defendant's

house on the day he and Billy were allegedly ordered by defendant to perform the sexual act. He also notes that Rhonda testified that when she went to the defendant's house on the Wednesday prior to his arrest she saw defendant and the two boys present.

It has long been the rule that the date alleged in the indictment is not ordinarily material and that it is sufficient if the People prove that the offense was committed at any time within the period of the statute of limitations. (People v. Robinson (1958), 14 Ill.2d 325, 337; People v. Vaughn (1945), 390 Ill. 360, 370-371; People v. Olroyd (1929), 335 Ill. 61, 68.) People v. Hinton (1958), 14 Ill.2d 424, cited by defendant, does not change the rule and is distinguishable on its facts. In Hinton, the court noted (page 427) that it was doubtful from the circumstances that any offense was committed but that it was clear that it did not occur at the time fixed in the bill of particulars. Here, there was no bill of particulars requested by the defendant to fix a specific date. Moreover, the defendant has not claimed that a variance between the indictment and the proof of the date of the crime misled him in preparing his defense. (See People v. Robinson (1958), 14 Ill.2d 325, 337.) The defendant was not misled since he sought to provide an alibi for a substantial time both before and after the June 30th, 1971 date specified in the indictment.

In contending that Billy's testimony was inherently unreliable, defendant argues that Billy said that he noticed nothing unusual about defendant's groin nor any unusual marks on defendant's penis, although defendant and his wife testified that defendant wore a Foley catheter at all times because of a lack of control over his bladder caused by the paraplegia and that the device was clearly visible when defendant's trousers zipper was open with the additional fact that the use of the catheter had produced an open wound on defendant's penis, one and one-half inches wide. As the State points out, however, there was no medical testimony supporting defendant's description in this regard, and there was testimony that

there could be periods of time between replacement of the old catheter with a new one which defendant would not be wearing the device. Further, there was nothing in the record to indicate that the witness, who was 8 years old at the time of the alleged occurrence, was familiar with an adult male's anatomy. It is also noted in this connection that Wesley testified to a description of something that looked like bubble gum when defendant allegedly opened his zipper; and a nurse, who was a witness for the State, testified that a bulb and tube used in the Foley catheter had a color which might be said to be similar to that of bubble gum.

Defendant further argues that the testimony of defendant and two other witnesses that Rhonda told the defendant on July 20th, 1971, "I am sorry I lied and got you into trouble" makes her testimony unreliable. Defendant also contends that the fact that the day the complaining witnesses went to the police, defendant had taken fireworks away from Wesley, coupled with Wesley's admission that he was "mad" at defendant because he did not give a party as he had promised on many occasions was a motive for false testimony which, together with the other inconsistencies, made the complaining witnesses' story unreliable and raised a presumption of defendant's innocence when his denial was coupled with corroborated alibi evidence.

Rhonda, however, denied making the statement attributed to her. Wesley testified that he was glad defendant took the firecrackers away after they found them on the street. The fact that Wesley admitted that he was still angry because defendant had not given the party for the children that he had promised so many times is not proof of his untruthfulness and in fact could probably have been considered by the court as an expression of candor.

Where the conviction of the crime of indecent liberties is based upon the testimony of a child, and the defendant denies the charge, the evidence must be corroborated or must be otherwise clear and convincing. People v. Walker (1958), 13 Ill.2d 334, 337; People v. Williams (1953), 414 Ill. 414, 416; People v. Kolden (1962), 25 Ill.2d 327, 329; People v. Ulrich (1963), 30 Ill.2d 94, 98.

From our view of the whole record defendant's arguments raise issues of credibility not so much related to the evidence of the offenses charged but as to ancillary circumstances. The inconsistencies in the testimony relate largely to collateral events. The trier of the facts was in the best position to weigh the inconsistencies and to determine the credibility of the witnesses in relation to proof of the material elements of the crimes charged. (See People v. Dunbar (1971), 1 Ill.App.3d 308, 312; People v. Dorsey (1965), 57 Ill.App.2d 389, 395; People v. Wendt (1968), 104 Ill.App.2d 192, 202.) The fact that there may be some inconsistencies in the testimony of witnesses does not necessarily destroy their credibility. See People v. Sharp (1943), 384 Ill. 503, 509.

In addition, the testimony of the children was substantially corroborated in various respects. Both Billy and Wesley were able to identify certain "adult" books which had been removed from defendant's trailer as those which the defendant had shown to them when prior indecent acts had allegedly been performed on them. Although Rhonda did not identify any of the books by title, she did describe one of the pictures that she had seen. The testimony of the complaining witnesses as to defendant's indecent acts prior to the offenses charged in the indictment showing a relationship between the parties and a course of conduct leading up to the particular offense, tended to make the witnesses' statements as to the particular offense charged inherently more believable. (See People

v. Sampson (1953), 1 Ill.2d 399, 403; People v. Kraus (1946), 395 Ill. 233, 237; People v. Gray (1911), 251 Ill. 431, 440.) It was also unlikely that the witnesses could testify in the detail that they did to the incidents related unless they had experienced the same. See People v. Tappin (1963), 28 Ill.2d 95, 99.

The court expressed its opinion on the record at the time it made its finding of guilt that it was impressed by the candor and the demeanor of the children and believed that they told the truth. The court was not required to believe defendant's alibi whether it found that the offenses were committed on June 30th, 1971, or on or about that date as alleged in the indictment. People v. Setzke (1961), 22 Ill.2d 582, 586.

Defendant has relied on People v. Thornton (1971), 132 Ill. App.2d 126, but we find that the case is clearly distinguishable from this case on the facts. From our examination of the complete record we agree with the finding by the trial judge that the testimony of the prosecuting witnesses was clear and convincing and in addition, corroborated by the circumstances. We therefore conclude that we may not substitute our judgment on the conflicting evidence for that of the trial judge who heard the case without a jury. See People v. Martishuis (1935), 361 Ill. 178, 185.

The judgment below is affirmed.

Affirmed.

GUILD, J. and RECHENMACHER, J. concur.

No. 73-36

In The
APPELLATE COURT OF ILLINOIS
Third District
A. D. 1974.

LOUISE CAMPBELL,)	
	)	Appeal from the
Plaintiff-Appellant,	)	Circuit Court of
	)	Henderson County.
vs.)	
)	
THE VILLAGE OF OQUAWKA, ILLINOIS,	)	Honorable
a Municipal Corp., EVERETT COX, DON	)	Gale A. Mathers
WILSON, LARRY GREEN, DENNIS	)	Judge Presiding.
JOHNSON, ORVILLE EDDINGFIELD,)	
JOHN HAMILTON and JAMES PIRTLE,)	
)	
Defendants-Appellees.)	

Mr. JUSTICE ALLOY delivered the opinion of the Court: Abstract

Plaintiff Louise Campbell appeals from an order of the Circuit Court of Henderson County which enjoined the Village of Oquawka from maintaining a levee in Front Street where such street is adjacent to lots in said block owned by plaintiff. The Village was ordered to remove a portion of the levee in front of plaintiff's property.

Plaintiff had originally filed an action against the Village of Oquawka and the Village Trustees praying for an injunction and damages. The injunction requested was to the effect that the Village be directed to eliminate the levee on the earthen dam on Front Street for the entire length of the block in which the premises of plaintiff are located. As indicated, the injunction was issued only to require removal of the levee from the portion of the street in front of the premises of plaintiff giving access to plaintiff to an adjoining street. Following

No. 73-36

In The
APPELLATE COURT OF ILLINOIS
Third District
A. D. 1974.

LOUISE CAMPBELL,)	
)	
Plaintiff-Appellant,	)	Appeal from the
	)	Circuit Court of
vs.	)	Henderson County.
)	
)	
THE VILLAGE OF OQUAWKA, ILLINOIS,	)	Honorable
a Municipal Corp., EVERETT COX, DON	)	Gale A. Mathers
WILSON, LARRY GREEN, DENNIS	)	Judge Presiding.
JOHNSON, ORVILLE EDDINGFIELD,)	
JOHN HAMILTON and JAMES PIRTLE,)	
)	
Defendants-Appellees.)	

Mr. JUSTICE ALLOY delivered the opinion of the Court:

Abstract

Plaintiff Louise Campbell appeals from an order of the Circuit Court of Henderson County which enjoined the Village of Oquawka from maintaining a levee in Front Street where such street is adjacent to lots in said block owned by plaintiff. The Village was ordered to remove a portion of the levee in front of plaintiff's property.

Plaintiff had originally filed an action against the Village of Oquawka and the Village Trustees praying for an injunction and damages. The injunction requested was to the effect that the Village be directed to eliminate the levee on the earthen dam on Front Street for the entire length of the block in which the premises of plaintiff are located. As indicated, the injunction was issued only to require removal of the levee from the portion of the street in front of the premises of plaintiff giving access to plaintiff to an adjoining street. Following

the issuance of the injunction, plaintiff filed a petition for rehearing and reconsideration, but the court denied the motion and allowed the injunction to stand as ordered.

On appeal in this Court, plaintiff seeks a reversal and a direction to the Circuit Court for removal of the levee from the entire block of the street and not just from the portion in front of plaintiff's lots. Defendant, on the contrary, maintains that ordering removal of the portion of the levee in question was within the trial court's discretion, and that the discretion was not abused. Defendant also contends that the placement of the levee by the Village was an exercise of defendant's police power in an emergency situation and that the exercise of such power was not abused. Defendant also stresses that the property rights of a riparian owner are subservient to the public need for protection from floods and that to prevail in an action of the type presented, the riparian owner must show a special injury.

The original dam was constructed in the spring of 1969 when the Village, acting through the Corps of U. S. Engineers, built a levee along Front Street to protect the property of city residents from the Mississippi River flood waters. The levee was constructed in portions of Front Street. Neither plaintiff nor her husband consented to the construction of the levee. It is contended by plaintiff that she is unable to drive or get her car out of her residence and that she has requested that the levee be removed. At the time the action was instituted and tried, the Village had not vacated any portion of the street. Because of the nature of the proceeding and the fact that injunctive relief is involved, it was directed to the attention of this Court by the defendant that the portions of Front Street covered by the existing levee have been vacated by action of the Village authorities. The attention of the Court was likewise directed to the circumstance that, by reason of the floods in 1973, the question raised in this

appeal is moot since the levee all along Front Street, including the portion in front of the residence of plaintiff, has been reconstructed and stands as a protection both to plaintiff's home and to other homes on Front Street in Oquawka.

While the owner of abutting property has the right to the use of his property, including the right of ingress and egress to his premises over and by means of the adjacent portion of a street, the rights of such adjoining owners (particularly riparian landowners) are subservient to public need for protection from flood waters and the owner in such case of a use for public safety or for a public purpose is remitted to his action for damages (People ex rel Calumet Federal Savings & Loan v. City of Chicago, 306 Ill. App. 524, 529, 29 N.E. 2d 292).

The issue before us is limited specifically to whether or not the trial court properly exercised its judicial discretion in the entry of the injunction requiring removal of part of the levee and permitting the remainder of the levee to stand. Since no objection is made by defendant to such removal order, the sole question, therefore, is whether there was an abuse of discretion by the trial court which would authorize this Court, as plaintiff has argued, to require the issuance of a mandatory injunction for the removal of the entire levee in the block involved. There was evidence in the record which would justify the construction of the levee as a protection as against floods.

It is clear that the Village was acting in the exercise of its police power in constructing the levee for the purpose of protecting the citizens of Oquawka, Illinois, from flood waters. In the exercise of such police power, the action of the Village should not be disturbed unless it is exercised arbitrarily (Bradbury v. Vandalia Levee and Drainage Dist., 236 Ill. 36, 47, 86 N.E. 163; 5 ALR2d 57, Annot.). In view of the fact that the record does not show any indicating of arbitrary action or abuse of power by the Village,

and that the action in constructing the levee was taken in light of emergency conditions to prevent flooding, the exercise of such police power outweighs the property rights of individuals (Sings v. City of Joliet, 237 Ill. 300, 310, 86 N.E. 2d 663). Under such conditions, the abutting plaintiff's property rights which are interfered with are such that plaintiff is remitted to an action at law for any damages plaintiff sustains by reason of such action by the municipality. From the record in this cause, it is apparent that no special injury to property which could not be recovered by way of damages is shown.

It is also clear that the plaintiff in the cause did not represent the remaining abutting property owners before whose homes the trial court permitted the levee to stand presumably as a protection. Such property owners in fact have intervened in support of the Village of Oquawka. Plaintiff had access (even though it may have been limited) from her home to an adjoining street, without the removal of the levee in front of other property within the block. We conclude, therefore, that the action of the trial court in refusing to extend the injunction to the entire block was proper.

While defendant has directed the attention of the Court to the fact of vacation of the street and the 1973 flood and the reconstruction of the levee, such matters were not before the trial court and there was nothing pending on appeal which requires or justifies further action by this Court. We, therefore, limit our determination in this cause on appeal to the only issue which was presented for determination and conclude that the order of the trial court appealed from was proper and should be affirmed.

Affirmed.

Stouder and Dixon, JJ. concur.

16
STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12031

Agenda 73-152

Evelyn I. Nejmanowski, Mother and
Next Friend of Richard C. Nejmanowski,
Jacqueline Nejmanowski, Bruce
Nejmanowski, Jeffery Nejmanowski,
Pamela Nejmanowski, Barbara Nejmanowski,
and Regina Nejmanowski, Minors,

Plaintiffs-Appellees,

VS.

Enos Waters.

Defendant-Appellant.

Appeal from
Circuit Court
Macoupin County

MR. PRESIDING JUSTICE CRAVEN delivered the opinion of the court:

Plaintiff, as mother and next friend of her named minor children, sued to recover certain sums of money of the children that allegedly were turned over to the defendant and used by him pursuant to an agreement. The defendant used the money for a certain pig raising operation in the profits of which the minors were to have participated.

After a bench trial, the court initially found that the defendant was indebted to and ordered repayment of the sum of \$4,300 to the plaintiff on behalf of the minors. Thereafter,

a post-trial motion was filed. That motion was allowed in part and denied in part. The judgment was modified and judgment in the amount of \$2,800.86 was entered in favor of the plaintiff and against the defendant. This appeal is from that judgment.

It is the contention of the defendant in this court that the trial court erroneously considered certain deposits in the bank account of the plaintiffs upon which checks were written to the defendant as funds of the plaintiff. The defendant contends that the judgment should be reduced to the sum of \$1,080, or in the alternative, to the sum of \$2,140.86. The plaintiff urges that the original judgment should be reinstated and urges in support of that proposition the so-called doctrine of plain error and cites Supreme Court Rule 615(a) applicable to criminal appeals. The plaintiff did not file a notice of cross-appeal and candidly concedes that the issue now asserted was not raised in the trial court.

The findings of the trial court in this case which are really the only issues in dispute are not against the manifest weight of the evidence. Upon our examination of this record, we find that no error of law appears; that an opinion reciting in minute detail the evidentiary facts would have no precedential value. Accordingly, pursuant to Supreme Court Rule 23 (Ill. Rev. Stat., 1972 Supp., ch. 110A, par. 23), the judgment of the circuit court of Macoupin County is affirmed.

JUDGMENT AFFIRMED.

TRAPP, SIMKINS, JJ., concur.

16 I.A.^{3D} 1055

16

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12181

Agenda 73-215

THE PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

v.)

OSCAR J. McNEAR,)

Defendant-Appellant.)

Appeal from
Circuit Court
Macoupin County
71-387

Mr. PRESIDING JUSTICE CRAVEN delivered the opinion of the court:

The defendant was found guilty in a jury trial of the offense of theft. A sentence of four months at the Illinois State Penal Farm was imposed. Upon this direct appeal the defendant contends that the trial court erred in certain evidentiary rulings and that the evidence was not sufficient to convict beyond a reasonable doubt. We affirm the conviction and the sentence.

The charge in this case was that the defendant obtained unauthorized control of four diamond wedding ring sets belonging to the Gillespie Jewelers. The testimony in the case was to the effect that the defendant and two women entered the jewelry store at a time when only one employee was on duty. The three parties,

one of whom was the defendant, remained in the jewelry store for some fifteen minutes. The defendant asked the clerk on duty questions concerning watches. In order for the clerk to show the defendant the watches about which he made inquiry, it was necessary for the clerk to leave her position behind the diamond case and to cross the room to a case containing watches. When the clerk moved behind the watch case the defendant and one of the women accompanying him proceeded to stand in front of her while the other woman remained in the vicinity of the diamond case. The clerk's view of the diamond case was obscured by the defendant and his female associate. The defendant asked questions about the different watches and asked the clerk to read the guarantees and papers concerning the watches to him. After the defendant and his two associates left the store and after the clerk returned to the diamond case she noticed that one of the doors to that case was ajar and that merchandise was missing from it. The evidence is clear that the merchandise was there before the defendant and his two associates entered the store and was missing immediately after they left the store and no other customers were present in the store. Additional testimony was received from owners of other jewelry stores -- one located in Virden and one located in Hillsboro. These witnesses related similar experiences in their stores involving the defendant and two female associates with a similar and, in fact, almost identical circumstance, including the same inquiry about watches.

The incident at the Virden jewelry store was on the same day as the instant offense and only a short period of time prior to the offense involved in this case. The Hillsboro jewelry store incident was on the day after this offense. It is the contention of the defendant on appeal that the evidence of the prior and subsequent incidents was erroneously admitted.

We agree with the appellant that it is a general rule that evidence of other offenses unrelated to the crime for which the defendant is on trial is not competent. (People v. Brown, 26 Ill.2d 308, 186 N.E.2d 321.) A well recognized exception to this general rule exists, however, and it is to the effect that evidence of other offenses unrelated to the crime for which the defendant is on trial may be admissible to prove design, motive or knowledge when those matters are an issue and are relevant. The exception is applicable here. In this case, the defendant was identified with reference to all incidents. The incidents all took place within a relatively short span of time. The circumstances of all the incidents were essentially identical and under such circumstance the trial court was correct in its admission of the evidence to establish defendant's scheme or design, mode and method of operation and to establish specific intent. See People v. Bennett, 9 Ill.App.3d 1021, 293 N.E.2d 687.

Upon the issue of the sufficiency of the proof to establish guilt beyond a reasonable doubt, we see no necessity for a more detailed recitation of the evidence, nor an in-depth

discussion of the merits of the issue. Our review of this record persuades us that the evidence was sufficient to convict beyond a reasonable doubt. Accordingly, pursuant to Supreme Court Rule 23 (Ill.Rev.Stat., 1971, ch. 110A, par. 23), the judgment of the circuit court of Macoupin County is affirmed.

JUDGMENT AFFIRMED.

TRAPP, SIMKINS, J.J., concur.

No. 72-283

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract
16 I.A. 1075^{3D}

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of the 18th Judi-
v.	)	cial Circuit, DuPage
	)	County, Illinois.
MICHAEL A. GRAMES,)	
)	
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant, Michael A. Grames, was convicted following a jury trial of one count of unlawful delivery and a second count of unlawful possession of cannabis, having a total weight of more than 500 grams. (Ill.Rev.Stat. 1971, ch. 56½, pars. 705(e), 704(e).) He was sentenced to concurrent terms of 1-4 years on each charge.

Defendant appeals, contending that he was deprived of a fair trial by reason of inadequacy of his privately retained counsel, and because of prejudicial cross-examination by the prosecutor.

The State's evidence consisted primarily of testimony from Illinois Bureau of Investigation Narcotics Agents. Agent Grady testified that two days before the arrest, he and Agents Gryz and Gulley had a conversation with Daniel Kreger and James McMullin (indicted co-defendants) concerning the purchase of some 100 pounds of marijuana. Upon arriving at the farm house designated for the purchase, Kreger and McMullin awakened another co-defendant, Seymour, who was sleeping in a van behind the house. At Seymour's

request Agent Grady showed him the money. They then drove some distance to a novelty store which defendant operated. McMullin, Kreger and Seymour went into the store and shortly came out with another defendant, Robert Palakie. An arrangement was made that one of the agents would accompany Seymour and Palakie to a location in which there would be approximately 100 pounds of marijuana. The group proceeded to a residence at 110 Lane Street in West Chicago, found to be the residence of Michael Grames and his wife, Mary Grames.

After arriving at the location, Palakie and Seymour entered the house. A short time later Seymour exited and approached the agents' vehicle and said that only two of the occupants of the vehicle could accompany him to the house because there were other people in the house. Agents Gulley and Grady accompanied Seymour into the house and proceeded into the kitchen. Grady testified that he observed three suitcases in the kitchen. Two of the suitcases were open and contained a number of small brown paper bags, each rolled and sealed. Michael Grames was present in the kitchen.

Grady further testified that he and Agent Gulley engaged in a conversation with Seymour as to the price of the marijuana per pound. When a price was agreed upon, both agents stepped outside for a few seconds, then reentered and agreed to purchase 25 pounds at \$125 per pound. Seymour then picked up a large plastic bag and accompanied by Palakie, took it to the agents' car where payment was requested, whereupon Seymour and Palakie were arrested.

Agent Gulley who accompanied Agent Grady into defendant's house testified that the major portion of the conversation in the kitchen consisted of haggling over the price. At one point Seymour stated that the reason for the high price was that each person in the kitchen was to receive a share of the money. When Agent Grady asked Seymour, Grames and Palakie whether or not they were in fact taking a cut of the price, Grames responded affirmatively.

Agent Gryz testified that he remained in the car while Grady and Gulley went into the house. Later when they came out Gryz entered the house with Gulley under pretext of wanting to examine the merchandise; and defendant handed him a brown paper bag from one of the suitcases. Gryz inspected several other bags and was informed that all the suitcases contained bags of marijuana. Ten minutes after the first arrest, Agents Gryz and Grady, and co-defendant McMullin returned to the house. The three suitcases were no longer in the kitchen, but were found in the yard, and seized during the ensuing search.

Defendant testified in his own behalf that Michael Seymour had helped him when his novelty store was being established by making deliveries and receiving reimbursement only for gas. On October 13, 1971, in return, he allowed Seymour to place three suitcases under the back porch of his house because Seymour claimed he had no place to live. Seymour also told him that the suitcases contained marijuana. On October 15th Seymour returned and said that he and the others would come and pick up the suitcases. When asked if it would be all right to bring people to the house for the pick-up, defendant consented and Seymour brought the suitcases inside, setting them on the floor and opening one or two of them. Later defendant argued with Seymour because he had been given the impression that everything would take only seconds, when in fact there was much movement from car to car and in and out of the house.

Defendant further testified that he was present when Seymour explained the high price had been set in order to pay others, but claimed the "others" were not designated. He denied that he would have received any share of the price and also denied being questioned concerning that possibility. Defendant made several trips into the living room to explain to his wife how upset he was and to ask her

to calm down. After everyone left the kitchen, he took the suitcases out into the back yard and returned to the living room. A short time later the police returned, charged in the front door and arrested everyone in the house, including two guests.

Defendant argues that the totality of the circumstances compels the conclusion that the representation of defendant was of such low caliber as to have deprived him of a fair trial. He first directs his claim of inadequate representation toward defense counsel's arguments to the jury in opening and closing. In substance, defendant's counsel advised the jury in his opening argument that defendant was told by Seymour what the suitcases contained; that they could find Seymour at all times had possession of the marijuana "but there is no question" that Grames and his wife were lessees of the premises. Additionally, in his closing statement, defendant's counsel told the jury that there was evidence to show defendant possessed the marijuana, explaining that possession can be based on the finding of the substance in the place defendant was renting; and that

"If the State wants to extract their pound of flesh from Michael Grames, make it on the possession, make it for what, even out of stupidity, out of misguided faith, out of whatever you want to call it, he may have been guilty of."

It is obvious from the record that the proof was overwhelming that defendant was guilty of knowing possession of more than 500 grams of marijuana. He knew the suitcases contained marijuana and the conclusion would be inescapable that containers of the size described would hold far in excess of the 500 grams (approximately 18 oz.) of the substance. The defendant admitted his knowledge of the nature of the substance on cross-examination. In addition, defendant had previously stipulated that the contents exceeded 500 grams in order to avoid emphasis of the large amounts of the substance in terms of pounds. It would appear reasonable that

counsel's trial strategy was to concede a violation of one of the statute's technical terms and to hope that the jury would feel that the circumstances did not call for a guilty verdict even as to possession. In fact, counsel may have reasonably believed that the forthright statement of what would have been obvious from the proof on the possession count could well have been in defendant's favor in the jury's consideration of the delivery charge. The appellate court will not reverse because an attorney's trial strategy is subject to challenge.

Defendant also argues that defense counsel implicated defendant in the common plan to deliver the marijuana when he also stated in his opening argument that:

"My client walks out and tells the agents there are people in the house, got to be careful, we can't all go in at one time, there are other people in the house we didn't expect-- Seymour."

when in fact no such evidence against him appears in the trial testimony.

The entire record clearly shows that it was Seymour who came out of the house to issue the warning, not the defendant. Since defense counsel clarified this fact on cross-examination, his misstatement in opening argument was not prejudicial error and was harmless beyond a reasonable doubt.

Defendant next argues that defense counsel's failure to object to hearsay testimony and leading questions was another indication of incompetence. From our examination of the entire record we are not so persuaded. Defendant refers to the testimony of Agent Grady that the agents had a conversation with co-defendants Kreger and McMullin in which they discussed arrangements for the purchase of marijuana; and that co-defendants Seymour and Palakie made further arrangements with the agents; all out of defendant Grames' presence and without objection by defense counsel. Defendant argues that

this was followed by Grady's further testimony that Seymour and Palakie said, in defendant's presence, that defendant was receiving a share of the purchase price, and defendant's alleged admission to Agent Grady that this was true. Defendant argues that Agent Gulley, who was present during these purported conversations, was unable to recall them until asked certain leading and suggestive questions, with no objection by defense counsel; and that he then corroborated Grady's testimony.

The testimony now characterized by defendant as hearsay concerned the statements of co-defendants. These were admissible as an exception to the hearsay rule. (People v. Daniels (1968), 92 Ill.App.2d 207, 213. See also People v. Carpenter (1963), 28 Ill. 2d 116, 120-122.) The failure to object to the leading questions asked of Agent Gulley is not of the magnitude to demonstrate incompetence of counsel either taken alone or on the whole record.

Defendant also argues that defense counsel's failure to move to suppress three suitcases containing marijuana seized in the yard indicates incompetence. Defendant does not contend that his arrest was unlawful but argues that a motion to suppress would have been sustained because the warrantless search exceeded the scope of searches incident to arrest as proscribed in Chimel v. California (1969), 23 L Ed 2d 685. Again we are not so persuaded.

It should first be noted that the bags containing 21.4 pounds of marijuana which were the objects of the sale to the agents were admitted at the trial and would not have been subject to a motion to suppress. Since this evidence was sufficient to convict, any error in the admission of the additional suitcases under the circumstances of this case was harmless beyond a reasonable doubt. See People v. Eastin (1972), 8 Ill.App.3d 512, 522-523.

Moreover, it is doubtful that a motion to suppress the cumulative evidence would have been successful. The suitcases containing

the balance of the marijuana were first observed by the police in plain view in the defendant's kitchen in his presence, two being open and revealing contents of marijuana. A short time later when the police returned to arrest defendant the suitcases and contents had been removed. They were retrieved, however, by an officer who testified that he saw them in the yard just outside the back door.

In Chimel, by contrast, the officers did not know the object of their search. The Chimel opinion does not prohibit all searches without a warrant, but only those which are unreasonable under constitutional standards, and recognizes that the scope of a search must be justified by the circumstances which made its initiation permissible. Chimel v. California (1969), 23 L Ed 2d 685, 693.

In our view, the suppression of evidence first seen, then removed a few minutes later, and found in open view outside the back door of the place of arrest would not be compelled by Chimel. We further note that the removal of the suitcases during the agents short departure to arrest the co-defendants gave the officers substantial reason to conclude that further delay in order to obtain a search warrant would result in concealment or destruction of the contraband. Therefore, the warrantless search and seizure following the lawful arrest may well have been justified under the exigent circumstances. We are not, of course, directly reviewing a challenge to the search but deal with it in relation to the claimed incompetence of counsel. From this standpoint we conclude that the record fails to reveal that counsel's failure to move to suppress the cumulative evidence of the suitcases was an act of incompetence. See People v. Washington (1968), 41 Ill.2d 16, 21-23; People v. Somerville (1969), 42 Ill.2d 1, 5-6.

Defendant also claims that the failure of his counsel to object to the prosecutor's arguments concerning accountability constituted prejudicial error. It should be noted that defense counsel

objected to the giving of the accountability instruction, but that his objection was overruled, and we think properly so. (See People v. Kessler (1973), 11 Ill.App.3d 321; People v. Sterkowicz (1973), 13 Ill.App.3d 311 (Abst.)) The questions and arguments of the prosecutor were framed in light of the instruction to be given by the court and were reasonably based on inferences drawn from the evidence. (See People v. Hairston (1970), 46 Ill.2d 348, 375.) In addition, the prosecutor's argument was directed in substantial part to the facts and inferences which indicated defendant's actual involvement in the scheme rather than his accountability for the acts of the others.

The record discloses that defense counsel moved successfully for the dismissal of a third count of the indictment, moved for substitution of judges, discovery, a directed verdict as to the delivery count, and for mistrial, thereby preserving these matters for appeal. Our review of the entire record assures us that, as a whole, the defense counsel's competency and familiarity with criminal tactics was evident. Defendant has not clearly established either the actual incompetency of counsel in carrying out his duties as a trial attorney or substantial prejudice which would probably have resulted in a different outcome. (See People v. Morris (1954), 3 Ill.2d 437, 444, 449. See also People v. Underhill (1967), 38 Ill.2d 245, 254; People v. Torres (1973), 54 Ill.2d 384, 391-2; and People v. Mentola (1971), 47 Ill.2d 579, 584.) Both People v. McCoy (1967), 80 Ill.App.2d 257 and People v. DeSimone (1956), 9 Ill.2d 522, cited by defendant are factually inapposite on the circumstances found in this record.

Defendant's contention that improper cross-examination by the prosecutor deprived him of a fair trial is based on the following inquiry:

"Q. Mr. Grames, do you sell anything else besides those things you listed in the store

that used to be called 'It's Been A Long Time Coming'?

A. Yes, sir, we sell quite a few things.

Q. Do you sell things called roach holders?

A. Yes.

Q. What is that?

A. A roach holder is like a paper clip and it's used to clip things and hold them.

Q. What sort of things do you clip with those?

A. Whatever you feel like clipping with them.

Q. Are they commonly used or occasionally used to hold the short ends of marijuana cigarettes?"

Before the last question could be answered defendant's trial counsel moved, in chambers, for a mistrial on the ground that the question was unrelated to the charge, and that it was prejudicial in that it inferred the commission of an unrelated illegal act. The court denied the motion for a mistrial and admonished the jury to disregard the reference to the items sold in the store "referred to by the State's Attorney as a roach holder, which was described as being a paper clip ***".

It is error to question a defendant with reference to an offense other than that charged for the sole purpose of showing a propensity on the part of a defendant to commit the crime charged. (People v. Lehman (1955), 5 Ill.2d 337, 342.) However, if the testimony, although not relevant, does not tend to show defendant's guilt of some other crime, and it cannot be reasonably inferred that the jury would so understand it, no prejudicial error results. (People v. Berry (1960), 18 Ill.2d 453, 460.) Further, in many instances the prompt sustaining of objections to prejudicial evidence and the court's instruction to the jury to disregard it may be said to remove any harmful effects the testimony might otherwise have. See People v. McCoy (1971), 133 Ill.App.2d 416, 423.

In our view, the nature of the questioning here falls far short of that involved in People v. Meid (1970), 130 Ill.App.2d 482; People v. Bryant (1971), 1 Ill.App.3d 428, or People v. McMillan (1970),

130 Ill.App.2d 633, cited by the defendant. It could not reasonably be assumed that the jury would understand by the questioning that it could infer that because defendant sold "roach holders" in his store he had propensity to or was more likely to have committed the charged offenses. The question relating to the use of "roach holders" was unanswered and any error or prejudice in the line of questioning complained of was cured by the court's admonishment to the jury.

The judgment of conviction is therefore affirmed.

Affirmed.

THOMAS J. MORAN, P.J. and GUILD, J. concur.

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